SUPREME COURT, U. S.

SEP 1 1967

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 566

ROYAL AMERICAN INDUSTRIES, INC. and JOHN D. MacARTHUR, *Petitioners*,

v.

DOLORES K. MURPHY, et al., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

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v.

DOLORES K. MURPHY, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

Petitioners pray that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of Florida, Fourth District, entered in the above entitled case on July 26, 1966.[1]

CITATIONS TO OPINIONS BELOW

The Final Decree of the Circuit Court of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County (R. Vol. I.

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1. The other Respondents are John E. Murphy, Harold L. Lane and C. C. Callaway, as Co-Executors under the Last Will and Testament of M. E. Murphy, M. A. Ramsey, Robert Elmore, Joseph C. Mackey, William Atwill, Jr., and George Kennedy.

pp. 105-108) is unreported and is printed in Appendix B hereto, *infra*, p. 24. The opinion of the District Court of Appeal of the State of Florida, Fourth District. (R. Vol. IV, pp. 1-5) printed in Appendix B hereto, *infra*, p. 18, is reported at 188 So. 2d 884.

JURISDICTION

The judgment of the District Court of Appeal of the State of Florida, Fourth District, was entered on July 26, 1966 (R. Vol. IV, pp. 1-5; Appendix B, p. 18, *infra*). Rehearing was denied on August 24, 1966 (R. Vol. IV, p. 6). Petitioners' application for a writ of certiorari was denied by the Supreme Court of Florida on March 29, 1967 (R. Vol. IV, p. 7). Rehearing was denied on June 8, 1967 (R. Vol. IV, p. 8).

The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257(3), as Petitioners' rights and privileges under a statute of the United States have been denied.

QUESTION PRESENTED

Whether a seller of securities is deprived of its federal right to rely upon investment letters executed by the purchasers of such securities at the time of sale, evidencing the intent of the parties that the sale be exempted from federal registration requirements by Section 4(2) of the Securities Act of 1933, by the judgment of a state court which refuses to give effect to such investment letters by construing the contract pursuant to which the sale took place to require registration with the Securities and Exchange Commission within six months after the sale, and treats such letters as mere 'receipts'.

STATUTES INVOLVED

The statutory provisions involved are Sections 5 and 4(2) of the Securities Act of 1933, Title 15 United States Code §§ 77e and 77d(2).[2] They are printed in Appendix A, *infra*, pp. 16-17.

STATEMENT

The Respondents were the controlling stockholders ("the Stockholders") of the Fort Pierce Port & Terminal Co. ("Terminal Co."). Petitioner John D. MacArthur was President and a substantial stockholder of Petitioner Royal American Industries, Inc. ("Royal American"). On August 1, 1962, Royal American, MacArthur, Terminal Co. and the Stockholders entered into a written agreement (the "Agreement"), under which the Stockholders agreed to exchange with Royal American 1,293,980 shares of common stock of Terminal Co. on a three-for-one basis for certain shares of Royal American stock (R. Vol. I, pp. 60-67). The pertinent provisions of the Agreement are paragraphs numbered (4) and (5):

> "(4) That ROYAL AMERICAN further agrees that it will cause the stock to be transferred to said STOCKHOLDERS to be registered with the American Stock Exchange without reservation or restriction in order that said stock may be freely exchanged or traded thereon. ROYAL AMERICAN further agrees that if it becomes necessary it

2. At the time of the transaction involved, the private offering exemption was contained in the second clause of Section (4)(1) of the 1933 Act (15, U.S.C. §77(d)(1)). However, in 1964, prior to the time of trial, the statute was amended and the clause containing the private offering exemption was renumbered Section 4(2) (15 U.S.C. §77(d)(2)) (78 Stat. 580, effective August 20, 1964). The statutory provision granting the exemption claimed herein will be hereafter referred to as amended in 1964.

will register or cause to be registered said stock with the Securities Exchange Commission and such other governmental agency as may be required. ROYAL AMERICAN further agrees that if it is unable to procure such registration as is required in accordance with the terms of this agreement it will pay to the said STOCKHOLDERS the sum of $2.50 per share of ROYAL AMERICAN stock called for under the terms of this agreement;

"(5) ROYAL AMERICAN further agrees to proceed with the registration of the stock within sixty days from date of the closing of this transaction, and to proceed with such registration continuously and diligently. ROYAL AMERICAN further agrees that if said registration is not completed within six months from the date of the closing of this transaction it will pay to the STOCKHOLDERS the sum of $2.50 for each share of ROYAL AMERICAN stock, provided, however, that the STOCKHOLDERS shall demand and accept the payment of $2.50 for each share of ROYAL AMERICAN stock not later than six months after the six months above mentioned expires. The STOCKHOLDERS shall have the right to either keep the unregistered stock or demand payment and receive payment immediately upon demand after the six months' period expires, provided, however, that such demand must be made within six months after the six months' period above mentioned has expired;" (R. Vol. I, p. 61).

Petitioner MacArthur agreed (Agreement, Paragraph 23; R. Vol. I, pp. 65-66) to guarantee the performance of Royal American under Paragraph 5 of the Agreement.

The closing of the transaction took place on November 7, 1962, at which time Royal American delivered and the Stock-

holders accepted certificates for the shares of Royal American stock which bore the following legend:

> "The shares represented by this certificate have not been registered under the Securities Act of 1933. The shares have been acquired for investment and may not be sold, transferred, pledged or hypothecated in the absence of an effective Registration Statement for the shares under the Securities Act of 1933 or an opinion of counsel for the Corporation presented to it prior to the proposed transaction that registration is not required under said Act." (R. Vol. I, p. 8)

In addition, the Stockholders individually executed and delivered to Royal American at the closing investment letters whereby they acknowledged that they represented and agreed as follows:

> "This will also acknowledge that I have represented to and agreed with you that I am purchasing such shares for investment with no present intention of selling or otherwise disposing of the same, subject only to my rights under such Agreement and Addendum." (R. Vol. I, pp. 53-58).

The Royal American shares delivered to the Stockholders at the closing, while listed with the American Stock Exchange (R. Vol. III, pp. 52-53), were thus not registered with the Securities and Exchange Commission, nor did Royal American proceed to cause such shares to be so registered within six months from the date of the closing.[3] Thereafter the Stockholders made demand upon Royal American and MacArthur to purchase the Royal American shares at $2.50 per share. The refusal

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3. The shares were subsequently registered with the SEC (in December, 1963) for reasons unrelated to the Agreement or the controversy involved here (R. Vol. III, p. 54).

of Royal American and MacArthur to comply with this demand resulted in the present litigation.

In the trial Court,[4] the Stockholders sought a decree ordering specific performance of Paragraphs 4, 5 and 23 of the Agreement, requiring Royal American and MacArthur to pay to the Stockholders $2.50 per share of the Royal American stock transferred pursuant to the Agreement (R. Vol. I, pp. 23-47). Royal American and MacArthur urged, among other things, that their obligation under the Agreement was to register the shares with the Securities and Exchange Commission only if such registration became necessary; that since it had been decided prior to and at the closing that the Stockholders would take the stock for investment rather than for resale or distribution to the public, thus making available the Section 4(2) exemption from the registration requirements of the Securities Act of 1933, registration with the Securities and Exchange Commission was rendered unnecessary; that the fact the Stockholders accepted the share certificates bearing the restrictive legend and executed the investment letters referred to above indicated the intention of the parties that the transaction was protected by the private offering exemption; and that to construe the Agreement to require registration by Royal American within six months of the closing would impute to Royal American and MacArthur and to the Stockholders an intent to violate the 1933

4. Royal American had filed a Complaint on or about May 24, 1963, seeking a declaration of its rights under the contract, or rescission of the contract or affirmative relief, and the Stockholders filed Answers and Counterclaims, during the period between March 31, 1964, and May 5, 1964, seeking specific performance. At the pretrial conference, which was held on October 21, 1964, the parties entered into a Stipulation pursuant to which Royal American agreed to withdraw its Complaint and it was agreed that the litigation would proceed on the Counterclaims of the Stockholders, with the Stockholders becoming plaintiffs and Royal American becoming defendant. MacArthur was also joined as a defendant at that time. (R. Vol. II)

Act by mechanically following the procedure generally employed to bring a transaction within the private offering exemption (*i.e.*, the execution of the investment letters) but without the bona fide investment intent necessary to render the transfer of unregistered stock lawful; and that the alternative construction of the Agreement together with the execution of the investment letters and acceptance of the certificates bearing the restrictive legends was the only construction consistent with an intention of the parties to close the transaction in strict compliance with the Securities Act of 1933.[5]

The trial Court denied the relief sought by the Stockholders (R. Vol. I, pp. 105-108; Appendix B, *infra*, pp. 18-23). The effect of its decision was to hold the Stockholders to their investment representations and to recognize the transaction as one completed in strict compliance with the federal law.

The District Court of Appeal reversed with directions that the trial Court enter a decree requiring Royal American, and upon its failure to perform, John D. MacArthur, to purchase

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5. For example, petitioners summed up the position taken by them at trial in their trial memorandum as follows:

> 'The plaintiffs are taking the untenable position that they really didn't mean it when they said they took the stock for investment purpose and they had no present intention of selling or disposing of it and that the truth of the matter is they wanted to sell it immediately but they just signed that statement so they could circumvent the federal law.'
>
> • • •
>
> 'The only way this contract and closing transaction can be interpreted so as to be within the bounds of federal law is to determine that this was a bona fide exempt transaction under the Securities Act of 1933. This means that the investment letters are exactly what they imply, an honest representation of investment and not a subterfuge. To hold otherwise the Court would be aiding and abetting the plaintiffs in violating the federal law.' *Memorandum Submitted by Royal American Industries, Inc., pp. 12, 13.*

the stock of Royal American from the Stockholders at $2.50 per share, with interest. The Court recognized that the transaction could not lawfully be closed, in the absence of an effective registration statement as to the Royal American shares, unless the transaction qualified as an exempt transaction (R. Vol. IV, p. 4; Appendix B, *infra*, p. 22); it also recognized that the transaction could qualify for the private offering exemption only "if it could be said that the securities were acquired by the purchasers for purpose of investment and with no present intention to dispose of the same." (*Ibid.*) However, the Court indicated that the "investment intent" of the purchasers necessary to qualify the transaction for the private offering exemption need not be a bona fide intent to hold the securities indefinitely but that an intent to hold the securities for a six month period pending registration would suffice (R. Vol. IV, pp. 3-4; Appendix B, *infra*, pp. 21-22). It thus held that the investment letters executed by the Stockholders, which it characterized as "receipts", and their acceptance of certificates containing the restrictive legend, were effective to render the transfer of the unregistered Royal American Stock to the Stockholders lawful under the Securities Act of 1933, but that they did not bind the Stockholders to hold the securities "for investment" within the meaning of that term under the 1933 Act, the Regulations promulgated by the Securities and Exchange Commission thereunder, or the decisions of the federal courts relating thereto. The Court stated that the letters constituted neither a "modification" of the covenant to register in the Agreement nor a "waiver" of the Stockholders rights to receive registered shares under the Agreement (R. Vol. IV, pp. 4-5; Appendix B, *infra*, pp. 22-23). Had the Court understood the significance, or even considered the existence, of the phrase "if it becomes necessary" in the covenant to register, it could have given full effect to the Stockholders' investment representations as an event contemplated by the Agreement rendering registration "unnecessary" under the

1933 Act, and would have been compelled to affirm the judgment of the trial Court in order to avoid construing the Agreement, together with the investment letters, as a transaction constituting an intentional attempt by the parties to evade the registration requirements of the Securities Act of 1933.

The Florida Supreme Court, holding that it lacked jurisdiction over the cause,[6] denied Petitioners' applications for a writ of certiorari (R. Vol. IV, p. 7), and for rehearing (R. Vol. IV, p. 8).

REASONS FOR GRANTING THE WRIT

1. The holding of the Florida District Court of Appeal that the investment representations of the Stockholders (hereafter "Respondents") were merely "receipts",[7] not evidencing any bona fide intent on the part of the purchasers to hold the securities for investment rather than for resale, and its refusal to view them as constituting an event which rendered registration unnecessary under the Agreement,[8] constitutes a decision by that

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6. That Court held that the District Court's decision did not directly conflict with any decision of any other Florida District Court of Appeal or of the Supreme Court of Florida on the same point of law, and hence that the case did not fall within the jurisdiction granted to it by Article V, Section 4 of the Constitution of the State of Florida.
7. This characterization by the Florida Court of the investment letters as mere "receipts" indicates clearly its misunderstanding of the status of such documents under federal law. Professor Loss has termed such letters "an integral feature of private offerings", noting that it is "prudent for the issuer . . . to request investment letters from the buyers." 1 LOSS, SECURITIES REGULATION, 666, 665 (2d ed. 1961).
8. The inconsistency and danger of combining an unconditional covenant to register with an investment letter has been pointed out by Professor Loss: "[T]he prudent buyer's exaction of a registration covenant from the issuer in the event of resale might itself damn the transaction." 1 LOSS, *supra*, at 671.

Court on a federal question of substance which is in clear conflict with the principle embodied in the decision of the United States Court of Appeals for the Second Circuit in *Gilligan, Will & Co. v. Securities and Exchange Comm'n*, 267 F.2d 461 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959).

The Florida Court's holding that the intent of the parties under the Agreement was that Royal American was bound by its covenant to register within six months "if it becomes necessary" even though Respondents had represented that they were taking the securities for investment clearly imputes to the parties, experienced businessmen, the intention that Respondents' investment representations meant that they intended to hold only for six months and no longer. Under the Second Circuit's decision in *Gilligan, Will* taking with such an intent constitutes an intentional violation of Section 5 of the Act which requires registration in advance of sale.

The Second Circuit in *Gilligan, Will* affirmed the announcement of the Securities and Exchange Commission[9] that the intention of a purchaser of securities to hold them for the six months' "capital gains period", to hold them for deferred sale, to hold them for a market rise, or to hold them for a year does not constitute a statutory basis for the private offering exemption from the registration requirements of the 1933 Act. Thus, there is a clear conflict between the decision of the Florida Court and the decision of the Court of Appeals for the Second Circuit in *Gilligan, Will* as to the nature of the "investment intent" required to bring a transaction within the private offering exemption of the 1933 Act. It is submitted that such a conflict presents a substantial reason for this Court to grant the petition for certiorari here. See *Katzinger v. Chicago Mfg. Co.*, 329 U.S.

9. *Re: The Crowell-Collier Publishing Company*, SEC Securities Act Release No. 3825 (August 12, 1957).

394, 398 (1947); *MacGregor v. Westinghouse Co.*, 329 U.S. 402 (1947).

2. The Florida decision, which constitutes a refusal to enforce the investment representations of the Respondents and in effect grants them permission to deny that they meant what they represented and agreed to at the closing, is in clear conflict with federal policy, to further compliance with the Act, to hold purchasers of securities transferred under the private offering exemption to their investment representations.

It directly conflicts with the principle adopted by the Second Circuit in *Fuller v. Dilbert*, 358 F.2d 305 (2d Cir. 1966), *aff'g on opin. below* 244 F.Supp. 196 (S.D.N.Y. 1965). In that case the United States District Court for the Southern District of New York (Weinfeld, J.), held that:

> "The only question before the Court is whether a purchaser of unregistered stock who is capable of fending for himself and who contracts that he . . . [is] taking for investment purposes only, may rescind the purchase[10] because of his own then undisclosed breach of contractual duty. [The purchaser] may be held to his undertaking to hold for investment. . . . Here there is no basis for any finding that the initial undertaking to hold for investment was designed to circumvent the registration requirements of the Act. Here there is no reason why the original agreement [to purchase the securities] should not be enforced; there are persuasive reasons why they should." 244 F.Supp. at 214.

Of similar import is *The Value Line Fund, Inc. v. Marcus*, CCH Fed. Sec. L. Dec. ¶91,523 (S.D.N.Y. 1965), where the

10. There rescission was sought under §12(1) of the Securities Act.

United States District Court for the Southern District of New York held that the purchasers there were estopped from denying that they intended to hold the securities for investment where they had executed investment letters at the time of the sale. See also *Fuller v. Dilbert*, 32 F.R.D. 60, 64 (S.D.N.Y. 1962) (dictum). State Court decisions are in accord. See *Short v. Soil Builders Int'l Corp.*, CCH Fed. Sec. L. Dec. ¶91,188 (Tenn.Ct. App. 1962); *cf. Altman v. American Foods, Inc.*, 262 N.C. 671, 138 S.E.2d 526 (1964).

The decision below, insofar as the effect of its construction of the Agreement together with the investment letters, is to impute to the parties an intention which, under the federal decisions, constitutes an intent to violate the Securities Act, not only deprives Petitioners of their right to rely on Respondents' investment representations in order to take advantage of the private offering exemption, but conflicts with the policy reflected in *Hunt Foods & Indus., Inc. v. Doliner*, 49 Misc.2d 246, 267 N.Y.S.2d 364, (Sup.Ct.) *rev'd on other grounds*, 26 App.Div.2d 41, 270 N.Y.S.2d 937 (1st Dep't 1966), that the state courts should not presume noncompliance with the Securities Act of 1933 by the parties to a sale of securities subject to that Act.

3. The decision of the Florida Court is also diametrically opposed to the Securities and Exchange Commission's construction of the investment intent requirement. In addition to its statement in the Crowell-Collier Release referred to above, the Commission has promulgated Regulation § 231.4552; 27 Fed. Reg. 11316 (1962), which provides in part that "... a limitation upon resale for a stated period of time or under certain circumstances would tend to raise a question as to original intent ..." See also SEC Securities Act Release No. 1862 (December 13, 1938). Such a conflict constitutes an additional reason

for the granting of certiorari in this case. See *Patterson v. Lamb*, 329 U.S. 539, 541 (1947).

4. The decision of the Florida Court is not only in conflict with the many federal and state decisions respecting the relationship of investment representations of the sort involved here and the availability of the private offering exemption, but it is clearly erroneous. The proper construction of the covenant to register "if it becomes necessary" in the Agreement, read together with the investment representations made by Respondents at the closing, is the one which was urged by Petitioners below and upon which they base their claim of federal right here—that the covenant to register the shares was intended to be operative only if registration became necessary; registration would be necessary if Respondents decided (between the execution of the Agreement and the date of the closing) to take for resale rather than for investment; by the time of the closing it had been decided that the purchase would be for investment rather than for resale. At this point the covenant to register became inoperative, since registration under those circumstances was not "necessary" under Sections 5 and 4(2) of the 1933 Act and the Regulations thereunder. The Florida Court's reference to the investment letters as mere "receipts" indicates that Court's basic misunderstanding of the nature of the transaction and the federal issues involved therein. Its holding that the covenant to register was absolute and unconditional rendered the words "if it becomes necessary" surplusage. If it had recognized the existence of these words it would have been able to view the investment letters as a possible event contemplated by the words "if it becomes necessary". In such a way it could have found meaning in all of the terms and documents involved in the transaction, and thus avoided a laborious and arbitrary construction of such terms and documents, rendering many of the acts of the parties mere surplusage; it could have adopted a construction which was con-

sistent with the established federal law governing the application, operation, and construction of the Securities Act of 1933, which did not impute to the parties an intent to violate the federal law, and which did not deprive Petitioners of their federal rights with respect to the availability of the private offering exemption. For the reason that the decision is so clearly erroneous, as well as the fact that it conflicts with the numerous federal and state decisions regarding the Act and the exemption here involved, Petitioners submit that this Court should grant the petition prayed for. See *Williams v. Lee*, 358 U.S. 217, 218 (1959).

5. The importance, to the general public, of the issue involved here relating to the federal status of the investment letter, which has become, as Professor Loss puts it, "an integral feature of private offerings" (1 LOSS, *supra*, at 666), is indicated by the numerous decisions above referred to. Further, the private offering exemption is one of the most frequently invoked exemptions from the registration provisions of the federal securities acts, and is thus involved in a large number of transactions by which unregistered securities change hands, many of which result in litigation involving questions as to the status of the type of document here involved. Petitioners urge that the question presented here is of sufficient public importance to warrant this Court's exercise of its jurisdiction to review the Florida Court's decision, which, it is submitted, conflicts with existing law and completely misapprehends and misapplies the Securities Act of 1933, resulting in a denial to Petitioners of important rights thereunder.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutory Provisions Cited and Quoted

Securities Act of 1933, Sections 5, 4(2)
(Title 15 United States Code §§77(e),(d)(2))

Section 5

§ 77e. Prohibitions relating to interstate commerce and the mails

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title. May 27, 1933, c. 38, Title I, § 5, 48 Stat. 77; June 6, 1934, c. 404, § 204, 48 Stat. 906; Aug. 10, 1954, c. 667, Title I, § 7, 68 Stat. 684.

Section 4(2)

§ 77d. Exempted transactions

The provisions of section 77e of this title shall not apply to—

* * *

(2) transactions by an issuer not involving any public offering.

APPENDIX B

Judgment and Opinions Below

Opinion and Judgment of the District Court of Appeal of the State of Florida, Fourth District

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JULY TERM 1966

DOLORES K. MURPHY, JOHN E. MURPHY, HAROLD L. LANE and C. C. CALLAWAY as Co-Executors under the Last Will and Testament of M. E. MURPHY, et al.,

Appellants,

v.

ROYAL AMERICAN INDUSTRIES, INC. and JOHN D. MacARTHUR,

Appellees.

CASE NO. 178.

Opinion filed July 26, 1966.

Appeal from the Circuit Court for Palm Beach County; R. O. Morrow, Judge.

R. Bruce Jones of Jones Adams Paine & Foster and H. L. Cooper, Jr., of O'Connell & Cooper, West Palm Beach; Samuel O. O'Bryan, Jr., of English McCaughan & O'Bryan, Fort Lauderdale;

and Phillip Goldman of Scott McCarthy Preston & Steel, Miami, for appellants.

C. Robert Burns of Burns Middleton Rogers & Farrell, Palm Beach, for appellees.

ANDREWS, Acting C.J.

This is an appeal by the plaintiffs, Dolores K. Murphy et al., from a final decree in favor of defendants, Royal American Industries, Inc., and John D. MacArthur.

Plaintiffs were the controlling stockholders of the Fort Pierce Port & Terminal Co. John D. MacArthur was President of Royal American Industries. On August 1, 1962, Royal American, MacArthur, Terminal Co. and plaintiffs entered into a written agreement under which plaintiffs agreed to exchange 1,293,980 shares of their Terminal Co. stock on a basis of three shares for one share of Royal American stock.

The agreement included the following provision:

"(4) That ROYAL AMERICAN further agrees that it will cause the stock to be transferred to said STOCKHOLDERS to be registered with the American Stock Exchange without reservation or restriction in order that said stock may be freely exchanged or traded thereon. ROYAL AMERICAN further agrees that if it becomes necessary it will register or cause to be registered said stock with the Securities Exchange Commission and such other governmental agency as may be required. ROYAL AMERICAN further agrees that if it is unable to procure such registration as is required in accordance with the terms of this agree-

ment it will pay to the said STOCKHOLDERS the sum of $2.50 per share of ROYAL AMERICAN stock called for under the terms of this agreement.

"(5) ROYAL AMERICAN further agrees to proceed with the registration of the stock within sixty days from date of the closing of this transaction, and to proceed with such registration continuously and diligently. ROYAL AMERICAN further agrees that if said registration is not completed within six months from the date of the closing of this transaction it will pay to the STOCKHOLDERS the sum of $2.50 for each share of ROYAL AMERICAN stock. . . ."

The provision to buy back the stock if not registered within sixty days was personally guaranteed by defendant, MacArthur. At the closing on November 7, 1962, the certificates for the shares of Royal American stock which were delivered to and accepted by plaintiffs bore a "restrictive legend" to the effect that the shares had been acquired by plaintiffs for purposes of investment, had not been registered under the Securities Act of 1933 and could not be transferred in the absence of an effective registration statement under that act.

Plaintiffs at closing signed a receipt commonly referred to as an investment letter which, in addition to describing the contract and the particular securities being exchanged, contained the following paragraph:

"This will also acknowledge that I have represented to and agreed with you that I am purchasing such shares for investment with no present intention of selling or otherwise disposing of the same, subject only to my rights under such Agreement and Addendum."

The Royal American stock was not registered with the American Stock Exchange or the Securities and Exchange Commission within six months so as to become freely exchanged or traded on the American Stock Exchange. The fact that the subject securities were registered with the Securities and Exchange Commission by prospectus effective December 23, 1963, is immaterial.

Plaintiffs made a demand upon Royal American and MacArthur for the purchase of the stock at $2.50 per share. Royal American and MacArthur failed to comply with the demand and plaintiffs sought a decree requiring the defendant to purchase their Royal American stock at $2.50 per share.

The trial court found that Royal American had not complied with the agreement and would be liable to repurchase the shares for failure to obtain their registration within six months under the provisions of paragraph 5, except that the contract had been modified at the closing by the investment letter.

Royal American had issued certain securities in exchange for property to Bankers Life & Casualty Insurance Company in a transaction not involving any public offering which it desired to loan to the company for use in exchange for the Terminal Co. stock. On September 27, 1962, New York counsel for Royal American advised that such was possible, but only on a restricted basis, and that authorized but unissued stock could not be issued without registration under the Securities Act. It was then that the Royal American approached the stockholders of Fort Pierce Terminal requesting that they acknowledge the stock of Royal American which they would receive would be for purposes of investment and not for resale. Under the contract of August 1, 1962, they might have to hold their stock before resale for six months awaiting the registration of the securities they were to receive in accordance with the terms of the contract.

In order for the securities of Royal American to be transferred in exchange for the stock of Fort Pierce Terminal such stock would have to be registered under the Securities Act of 1933, 15 U.S.C.A. § 77(f), as amended, or the Securities and Exchange Act of 1934, as amended, 15 U.S.C.A. § 78(1), or qualify as an exempt transaction by an issue not involved in a public offering, 15 U.S.C.A. § 77(d). When a company already has stock listed on a national securities exchange, it can apply for listing of additional securities under procedures under the Securities and Exchange Act of 1934, which in substance has the same requirements as registration with the Securities and Exchange Commission. 2 LOSS, SECURITIES REGULATIONS 787 (2d Ed. 1961). Therefore, the stock of Royal American could only be issued prior to the effective date of registration statement under either of these acts if it could be said that the securities were acquired by the purchasers for purpose of investment and with no present intention to dispose of the same.

Under the circumstances the contract of August first could have been closed by delivery and exchange of the stock only in violation of the Securities Act, supra, in that it had not been registered in compliance with either of the said acts. The receipt reciting an intention not to dispose of said stock was executed at the request of Royal American in an effort to avoid such violation. Such receipt did not constitute a modification of the contract in that there was no consideration for a change or modification. Gunby v. Drew, 1903, 45 Fla. 350, 34 So. 305; Robinson v. Hyer, 1895, 35 Fla. 544, 573, 17 So. 745, 750. An estoppel did not arise in that by signing the investment letter plaintiffs received no benefit but merely acknowledged a known fact that they might not be able to sell their stock until registered, and such action by the plaintiffs was not to the detriment of the defendants. Enstrom v. Dunning, 1939, 136 Fla. 253, 186 So. 806, 812. The same did not constitute a waiver of the provisions of

the contract in that there was no showing of the intentional relinquishment of a known right. Macina v. Magurno, Fla. 1958, 100 So.2d 369.

Accordingly, we reverse with directions that the court enter a decree requiring Royal American, and upon its failure to perform, John D. MacArthur, to purchase the stock of Royal American Industries, Inc., from the plaintiffs at a price of $2.50 a share, together with interest thereon from the date demand was made for payment, or May 1, 1963, whichever is later.

WALDEN, J., and RAWLS, JOHN S., Associate Judge, concur.

Opinion of R. O. Morrow, Circuit Judge

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR PALM BEACH COUNTY. IN CHANCERY

NO. 63 C 1097-B

DOLORES K. MURPHY, M. A. RAMSEY, ROBERT ELMORE, JOSEPH C. MACKEY, WILLIAM ATWILL, JR., and GEORGE KENNEDY,

Plaintiffs,

vs

ROYAL AMERICAN INDUSTRIES, INC., and JOHN D. MacARTHUR,

Defendants.

FINAL DECREE

This cause was set for trial on October 21, 1964, and at that time a pretrial conference was held, and the record of the pretrial proceedings was taken and constitutes 51 pages. Among the stipulations entered into at pretrial were that the plaintiff withdrew its Complaint, and the original defendants would become the plaintiffs and proceed on their respective counterclaims and crossclaims, and the plaintiff, ROYAL AMERICAN INDUSTRIES, INC., and the defendant, JOHN D. MacARTHUR, would be the defendants. The plaintiffs are DOLORES K.

MURPHY, M. A. RAMSEY, ROBERT ELMORE, JOSEPH C. MACKEY, WILLIAM ATWILL, JR., and GEORGE KENNEDY. Hereafter, the parties will be referred to as stated above.

The plaintiffs bring suit for specific performance of contract and the defendants rely upon the general denial and affirmative pleas of waiver and estoppel. The Court has considered all of the stipulations and admissions, as set forth in the pretrial conference, and has heard all of the testimony and examined all of the documents admitted at trial, which was held on November 4, 1964; and finds as follows:

The defendant, ROYAL AMERICAN, entered into a contract with the plaintiffs on August 1, 1962, whereby Royal American agreed to purchase from the plaintiffs 1,293,980 shares of common stock of Ft. Pierce Port & Terminal Co., and to transfer to the plaintiffs one share of Royal American stock for each three shares of said Ft. Pierce stock. The contract further provides that the Royal American stock would be registered with the American Stock Exchange without reservations or restriction, in order that said stock would be freely exchanged or traded thereon; also, Royal American agreed in said contract that, if it became necessary, it would register or cause to be registered said stock with the Securities Exchange Commission. Also, if unable to procure such registration, it agreed to pay the plaintiffs the sum of $2.50 per share of Royal American stock, which was transferred in pursuance of said agreement. Royal American was to proceed with the registration of said stock within 60 days from the date of closing, and to have said registration completed within six months. The plaintiffs were to have the right to either keep the unregistered stock or to demand payment of $2.50 per share, if said stock was not registered within six months, provided demand was made within six months

after the deadline for registration. The transaction was closed on November 7, 1962. Some stock of Royal American Industries, Inc., had been registered with the American Stock Exchange and was tradable at the time of closing. At the time of closing, the stock which was delivered by the defendants to the plaintiffs had a legend printed on the stock, as follows: "These shares have been acquired for investment". The plaintiffs received said stock and each gave a letter wherein each agreed that he was purchasing said stock for investment and with no present intention of selling or otherwise disposing of said stock, but that the same was received subject to their rights under the agreement in question and the addenda to such agreement; said letters are plaintiffs' exhibits One through Six.

The first issue is a construction of the contract; the Court construes paragraph (4), of the contract, to mean that Royal American was to transfer Royal American Stock to the plaintiffs, which was freely exchangeable and tradable on the American Stock Exchange; further, that, if necessary, Royal American would register or cause to be registered said stock with the Securities Exchange Commission, in order that the same be freely tradable; and, if it were unable to procure such registration, it would buy back the stock at $2.50 per share. The Court construes paragraph (5), of the contract, to mean that Royal American had six months from the date of closing within which to effect such registration as was necessary.

The Court finds that Royal American failed to have said transferred stock registered so as the same was freely tradable on the American Stock Exchange within six months of closing; and, further finds that said stock was so registered and was freely tradable on the American Stock Exchange subsequent to said six months period; and further finds that Royal American did not comply with the agreement in question, and would be liable

under paragraph (5), of said contract, but for the fact that said contract was modified in writing by the agreements of the several plaintiffs above referred to as plaintiffs' exhibits One through Six. At the time of closing, the plaintiffs agreed to receive the said shares of stock with the legend on, as aforesaid, and stated they received the same for investment purposes, with no present intention of selling or otherwise disposing of the same. This altered the conditions of the original contract with reference to the stock being freely tradable and the time element of registration. The rights reserved in each of said alteration agreements were such rights under the agreement and addendum as were not in conflict with said alteration agreements. The fact that there was no "present intention" of selling or disposing of said stock by the plaintiffs renders the time element indefinite. The contract provides that Royal American would "proceed with such registration continuously and diligently", and this controls as to the final effecting of such registration. The Court finds that Royal American proceeded with diligence and did effect the registration necessary for said stock to be freely tradable, as aforesaid; it is thereupon

ORDERED, ADJUDGED AND DECREED that the plaintiffs take nothing by their Complaint, and that the defendants go hence without day, and that each of the parties pay their respective costs.

Copy furnished counsel.

DONE AND ORDERED at West Palm Beach, Florida, this January 5, 1965.

R. O. Morrow
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Certiorari and Appendix has been served upon each of the following:

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attorneys for respondents, by mail, this ..... day of ....., 1967.

.....
Attorney for Petitioners

SUPREME COURT, U. S.
SEP 30 1967

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 566

ROYAL AMERICAN INDUSTRIES, INC. and JOHN D. MacARTHUR,

Petitioners,

v.

DOLORES K. MURPHY, et al.,

Respondents.

On Petition for a Writ of Certiorari To the District Court of Appeal of the State of Florida, Fourth District

BRIEF FOR RESPONDENTS IN OPPOSITION

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DOLORES K. MURPHY, et al.,

Respondents.

On Petition for a Writ of Certiorari To the District Court of Appeal of the State of Florida, Fourth District

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether sufficient reason exists for this Court to review a decision of a state intermediate appellate court, which rested upon the construction of a contract, when the purported federal question urged as a predicate for this Court's jurisdiction was first raised below on petition for rehearing before the state court of last resort.

STATEMENT

Petitioners' statement is argumentative, incomplete and in material respects inaccurate and misleading.

A. THE FACTS

Respondents were the controlling stockholders of the Fort Pierce Port & Terminal Co. Petitioner John A. MacArthur was president and a substantial stockholder of Petitioner Royal American Industries, Inc.

On August 1, 1962, Royal American, MacArthur, Terminal Co. and Respondents entered into a written agreement whereby Respondents agreed to exchange 1,293,980 shares of their Terminal Co. stock on a basis of three shares of Terminal Co. for one share of Royal American stock. (R. Vol. I, pp. 60-67).[1]

This Agreement contained the following provisions:

> (4) That ROYAL AMERICAN further agrees that it will cause the stock to be transferred to said STOCKHOLDERS to be registered with the American Stock Exchange without reservation or restriction in order that said stock may be freely exchanged or traded thereon. ROYAL AMERICAN further agrees that if it becomes necessary it will register or cause to be regis-

[1]Respondents shall use "R" to refer to the record filed with this Court at the October Term, 1967, and "A" to refer to the Appendix of this brief of Respondents.

tered said stock with the Securities Exchange Commission and such other governmental agency as may be required. ROYAL AMERICAN further agrees that if it is unable to procure such registration as is required in accordance with the terms of this agreement it will pay to the said STOCKHOLDERS the sum of $2.50 per share of ROYAL AMERICAN stock called for under the terms of this agreement.

(5) ROYAL AMERICAN further agrees to proceed with the registration within sixty days from date of the closing of this transaction, and to proceed with such registration continuously and diligently. ROYAL AMERICAN further agrees that if said registration is not completed within six months from the date of the closing of this transaction it will pay to the STOCKHOLDERS the sum of $2.50 for each share of ROYAL AMERICAN stock. . . . (R. Vol. I, p. 61).

At the closing on November 7, 1962, the certificates of Royal American stock which were delivered to Respondents bore a restrictive legend to the effect that the shares had been acquired for investment, had not been registered under the Securities Act of 1933, and could not be transferred in the absence of an effective registration statement under that act. (R. Vol. I, p. 8).

Also, at the closing each respondent signed a receipt commonly referred to as an investment letter which, in

addition to referring to the agreement and the particular securities being exchanged, contained the following paragraph:

> This will acknowledge that I have represented to and agreed with you that I am purchasing such shares for investment with no present intention of selling or otherwise disposing of same, *subject only to my rights under such Agreement and Addendum.*[2] (R. Vol. I, pp. 53-58; A. 19).

The Royal American stock was not registered with the American Stock Exchange or the Securities and Exchange Commission within six months so as to become freely exchangable or tradeable on the American Stock Exchange. (R. Vol. I, pp. 105-108; Petition, Appendix B, p. 21).

The Respondents thereupon made demands upon Royal American and MacArthur to comply with the agreement and to buy back their Royal American stock at $2.50 per share. Royal American and MacArthur refused to comply with the demands and this litigation ensued.

B. THE PROCEEDINGS IN THE TRIAL COURT

This action was instituted by the filing of a Complaint in the Circuit Court for Palm Beach County, Florida, by Royal American. (R. Vol. I, pp. 1-22). The Respondents filed responsive pleadings seeking specific performance of paragraph 4, 5 and 23 of the agreement. (R. Vol. I, pp. 23-47).

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[2] All emphasis is ours unless otherwise indicated.

At a pretrial conference the parties entered into a Stipulation whereby Royal American withdrew its Complaint and the litigation proceeded on the Counterclaim of the Respondents. Thereafter, the Respondents were referred to as plaintiffs and the Petitioners were referred to as defendants. (R. Vol. 11, p. 3).

A further stipulation arrived at during the pretrial conference resulted in a delineation of the issues upon which the action was to be tried. (R. Vol. II, p. 6-8). More specifically, the Petitioners' attorney, Mr. Pruitt, stipulated these issues to be:

> MR. PRUITT: Yes, I said broadly stated, I think it is better to just tear it down to the — say that the issues on behalf of them, that we failed to comply with the contract, and we are talking about paragraphs four and five of the contract. We failed to comply.
>
> MR. GOLDMAN: Plus 23, which is MacArthur as guarantor.
>
> MR. PRUITT: Four, five and 23. We failed to comply with those provisions of the contract. Our answer thereto is we complied, number one. Number two, is that there was misrepresentation in inducing us to enter into paragraphs four, five and 23; that they hindered or prevented us from complying with paragraphs four, five and 23 and/or that they waived any rights that they might have had under four, five and 23. (R. Vol II, pp. 6-7).

The matter was then tried on the stipulated issues. The trial court found that Royal American had not complied with the agreement and would be liable, under paragraph (5) of the agreement, to repurchase the shares, but for the fact that said contract was modified in writing at the closing by the investment letters. (R. Vol. I, pp. 105-108; pp. 53-59). Significantly, the Final Decree was devoid of any reference to federal law. The decision was based only upon the Chancellors' construction of the contract and the application of principles of contract law.

C. THE PROCEEDINGS IN THE DISTRICT COURT OF APPEAL

The Respondents thereupon appealed the Final Decree to the District Court of Appeal of Florida, Fourth District.

In their appeal, the Respondents urged that the Trial Court had correctly construed the agreement but had erred in its finding that the agreement had been modified at the closing. (R. Vol. I, pp. 111-113; A. 14-15). The Petitioners attempted to sustain the Trial Court's finding upon the sole ground that the evidence supported the decree. Again, as shown by Petitioners' Brief to that Court, they made no reference to federal law. (A. 11-13).

In its opinion, the District Court of Appeal held that the agreement had not been modified at the closing, and, further, that there was no evidence in the record to sustain the Petitioners' affirmative defenses of waiver and estoppel. As the Court's opinion reflects, its decision was based entirely upon applicable Florida law and did not involve any purported federal question or issue.

Accordingly, the District Court of Appeal reversed the Trial Court with directions that a decree be entered requiring Royal American, and upon its failure to perform, John D. MacArthur, to purchase the stock from the Respondents at a price of $2.50 per share. (R. Vol. IV, p. 4; Petition, Appendix B, p. 23).

A Petition for Rehearing before the District Court of Appeal by Royal American and MacArthur was denied without opinion. (R. Vol. IV; A. 3).

D. THE PROCEEDINGS BEFORE THE SUPREME COURT OF FLORIDA

The Petitioners then made application to the Florida Supreme Court for a writ of certiorari to the Florida Fourth District Court of Appeal urging that the lower Court's decision was in conflict with a decision of another District Court of Appeal or of the Florida Supreme Court. Again, the Petitioners did not urge federal law. To the contrary, the Petitioners expressly recognized in their Brief that the District Court of Appeal had ruled on all three of their defenses, to-wit: modification, estoppel and waiver. (A. 10).

The Florida Supreme Court denied the Petition stating that it was without jurisdiction. (R. Vol. IV, p. 7; A. 2). Petitioners then made application to the Florida Supreme Court for rehearing. As a last resort, they included in their Petition an argument that to require Petitioners to buy back their own stock, pursuant to the terms of the agreement, would necessarily constitute a violation of the Securities Act of 1933.

The Florida Supreme Court denied the Petition for Rehearing without opinion. (R. Vol. IV, p. 8; A. 1).

REASONS FOR DENYING THE WRIT

1. A FEDERAL QUESTION WHICH IS FIRST RAISED ON PETITION FOR REHEARING BEFORE A STATE COURT OF LAST RESORT IS NOT TIMELY RAISED AND, THEREFORE, DOES NOT PROVIDE A BASIS UPON WHICH THIS COURT MAY ACQUIRE JURISDICTION TO REVIEW A DECISION OF A STATE COURT.

A long settled principle to which the Supreme Court of the United States has rigidly adhered is that it has no jurisdiction to review a judgment of a state court unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by the state court. *Whitney* v. *State*, 274 U. S. 357, 360 (1927); see also *Simmerman* v. *State*, 116 U. S. 54 (1885). Accordingly, it has been held on numerous occasions that when a federal question is first raised on a motion for rehearing before a state court of last resort and that court denies the motion without opinion, then it is not seasonably raised and there is no basis for review by the Supreme Court of the United States. See, e.g., *Hanson* v. *Denckla*, 357 U. S. 235, 243-244 (1958); *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 128-29 (1945); and *Herndon* v. *State*, 295 U. S. 441, 443 (1935).

The case at bar falls squarely within these time-

settled rules. The record clearly reflects that no federal question of substance was properly raised at any stage of the proceedings in the lower Courts. At the trial level, this is demonstrated by the stipulation of the parties at the pretrial conference concerning the issues to be tried. (R. Vol. II, pp. 6-8). These issues were restated by the Chancellor in his Final Decree as follows:

> "The plaintiffs bring suit for specific performance of contract and the defendants rely upon the general denial and affirmative pleas of waiver and estoppel." (R. Vol. I, pp. 105-106; Petition, Appendix B, p. 25).

Further, the Chancellor's findings and Final Decree show that a federal question was not raised or considered. The decree was based solely on a construction of the agreement and the various other documents.

The only real question presented to the District Court of Appeal was whether the Trial Court erred in concluding that the agreement had been modified at the closing by the execution of the investment letter. (R. Vol. I, p. 108; Petition, Appendix B, pp. 26-27). The holding of the District Court was limited to the resolution of that question in favor of Respondents, with the exception that the District Court also concluded that an estoppel had not arisen by the execution of the letters and that the same did not constitute a waiver. (R. Vol. IV, pp. 4-5; Petition, Appendix B, pp. 22-23). Moreover, the Petitioners, in their Brief to that Court, defined the issue before the Court as being:

> "Was there competent substantial evidence be-

fore the trial court to support the legal conclusion reached in the Final Decree." (A. 13).

Further, the Petitioners did not cite one federal authority in their Brief to that Court. (A. 11-12). Clearly, then, there is no indication that a federal question of substance was either properly presented to or ruled upon by the Fourth District Court of Appeal of Florida.

It is also evident that no federal question was presented to the Florida Supreme Court by the Petition for Writ of Certiorari sought by Petitioners in that Court. This is clearly evinced by reference to Petitioners' Brief filed in support of their petition to that Court. As in their Brief to the District Court of Appeal, Petitioners' Points on Appeal did not allude to the existence of a federal question, nor did they cite a single federal authority to support the position which they now strenuously maintain. (A. 5-10).

In their Petition for Rehearing before the Florida Supreme Court, the Petitioners requested the Court to consider the points which they had urged in their previous petition and finally attempted to raise the existence of a federal question. The Florida Supreme Court denied the Petition for Rehearing without opinion. (R. Vol. IV, p. 8; A. 1).

It is clear, therefore, that in the case at bar, the purported federal question now urged by Petitioners was neither timely raised, presented to or ruled upon by the Florida Courts. This explains why the Petitioners have failed to comply with this Court's Rule 23(1)(f) which reads:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

This also explains why the Petitioners, in an effort to sustain the jurisdiction of this Court, are forced to rely upon a footnote reference to their memorandum to the Trial Court (Petition, p. 7, n. 5), a document dehors the record and not submitted to the Trial Court until after the issues had been framed and tried.

The purported federal question relied upon by the Petitioners has been raised too late, and the Petition should be denied for that reason alone.

2. THERE IS NO FEDERAL QUESTION OF SUBSTANCE IN THIS CASE.

Section 5 of the Securities Act of 1933 makes it unlawful for anyone, by any interstate communication or use of the mails, to sell or deliver any security unless a registration statement is in effect. (15 U.S.C. § 77 e). Section 4(2) of that Act exempts from Section 5 transactions by any person other than an issuer, underwriter or dealer and transactions by an issuer not involving a

public offering—the so called "private offering exemption." [15 U.S.C. § 77d(1)].

In the case at bar, the trial court found that investment letters had been executed at the closing by the Respondents at the request of Petitioners. (R. Vol. I, pp. 106-107). The investment letters recited, after describing the Agreement, as follows:

> This will acknowledge that I have represented to and agreed with you that I am purchasing such shares for investment with no present intention of disposing of same, *subject only to my rights under such Agreement and Addendum.* (R. Vol. I, pp. 53-58; A. 19).[3]

Despite this language of the agreement wherein the parties expressly recognized that the Petitioners would be obliged to buy back the Royal American stock if it were not registered within six months, the Petition herein seeks to create the impression that the Petitioners were somehow deprived of their "federal right to rely upon investment letters executed by the purchasers of such securities at the time of sale * * * ." (Petition, p. 2). The plain fact of the matter is that the Florida state courts merely enforced the terms of the agreement and

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[3]The reservation of rights contained in the quoted clause of the investment letter was consonant with the provisions contained in Paragraph 15 of the Agreement, which were as follows:

> (15) Any agreements to be performed by either of the parties as set forth in this Agreement shall survive the transfer of stock in this Agreement. All parties shall be required to perform all acts provided for by this contract even though the transfer of the stock has been made between the parties hereto; . . . (R. Vol. I, p. 15).

of the investment letters themselves. The Petitioners were not misled; they agreed to buy back the stock.

Moreover, by requiring Petitioner Royal American, the issuer, or, upon its failure to do so, Petitioner MacArthur, the guarantor, to reacquire the stock, the decision of the District Court of Appeal neither imputed to the parties an intent to violate the Securities Act, nor did it conflict with existing federal policy.

The principal and essential purpose of the Securities Act is to protect innocent purchasers by requiring registration with the Securities and Exchange Commission of certain information concerning securities offered for sale. *Gilligan, Will & Co.* v. *Securities and Exchange Commission*, 267 F. 2d 461, 463 (2d Cir. 1959); *Fuller* v. *Dilbert*, 244 F. Supp. 196, 213 (S. D. N. Y. 1962). Here, innocent purchasers are not endangered by enforcing the contract pursuant to the mandate of the District Court of Appeal. The stock is to be reacquired by the issuer, or, upon its failure, then by the guarantor, MacArthur. Thus, the effect of the lower courts' holding is nothing more than the enforcement of an arms length agreement between the parties. Clearly, the purpose of the Act can not be transgressed by reacquisition by the issuer or his guarantor. Such reacquisition can hardly be considered a public offering or further distribution in view of the plain import of the Act's purpose.

Furthermore, it is difficult to conceive how the ruling of the lower court can be construed as imputing to the parties an intent to violate the Securities Act, a contention which has strenuously been urged by Petitioners in their Petition to this Court. The only conceivable

manner in which such an effect can be imputed is if reacquisition by the issuer may be held to be a further distribution of the stock. However, a construction of the Securities Act to that effect would be incongruous. It is not the issuer which the Act protects, but rather the innocent and uninformed purchaser. An issuer, or a major stockholder, can hardly be considered synonymous with an innocent purchaser, especially in the circumstances of this case.

It is, therefore, submitted that this case presents no federal question of substance.

3. NO PUBLIC INTEREST WILL BE SERVED BY PERMITTING REVIEW OF THE LOWER COURT'S DECISION.

The decision below turns upon its own facts and will affect no one but the litigants. It is based upon the construction, pursuant to applicable Florida law, of an arms length transaction between the parties.

Also, the effect of the decision is to secure to the Respondents their rights under the agreement as contemplated by both Petitioners and Respondents. This is reflected in the record by an opinion letter written shortly before the closing to Petitioner Royal American by its own securities expert, the New York law firm of Simpson, Thacher & Bartlett. The pertinent portions of this letter are as follows:

> Our information with respect to this transaction, based on information supplied to us *by representatives of the Company*, is as follows:

> The Company proposes to issue 438,101 shares of its Common Stock to six stockholders of Fort Pierce Port & Terminal Co. (FORT PIERCE) in exchange for the 1,293,980 shares of FORT PIERCE stock owned by those stockholders. The Company has agreed to provide financing arrangements with respect to the payment of $383,371 of FORT PIERCE liabilities and has advanced the sum of $74,000 against these liabilities and an additional $25,000 of working capital. *The stock of the Company will be issued on a "restricted basis" for investment and the Company has agreed to proceed with the registration of the stock of the Company within sixty days after the closing of the transaction. If such registration is not effected within six months after the closing, the six stockholders have a right to demand redemption of the stock of the Company at $2.50 per share.* The FORT PIERCE stock is presently held in escrow. (R. Vol. I, pp. 99-100; A. 16-18).

It is thus apparent from this letter that the Petitioners' concept of this transaction was identical with that of the Respondents and the District Court of Appeal. It is also apparent that, at the closing, Petitioners were fully aware that notwithstanding the investment letter, they would be required under the Agreement to register the stock within six months or to repurchase the shares upon demand.

We respectfully submit that it is not in the public interest to permit Petitioners to evade their contractual commitment on a legal theory which directly conflicts

with the understanding of all parties concerned as formulated by the formal opinion letter rendered by Petitioners' own expert counsel prior to the consummation of the transaction.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Petition be denied.

Respectfully submitted,

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APPENDIX

1. Denial of Petition for Rehearing by Supreme Court of Florida

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A. D. 1967
THURSDAY, JUNE 8, 1967

CASE NO. 35,723

ROYAL AMERICAN INDUSTRIES, INC., ET AL,
Petitioners

-vs-

DOLORES K. MURPHY, ET AL,
Respondents

On consideration of the Petition for Rehearing filed by Attorneys for Petitioners,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY

TEST:
SID J. WHITE
Clerk Supreme Court

2. Denial of Petition for Writ of Certiorari by Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1967
WEDNESDAY, MARCH 29, 1967

CASE NO. 35,723
DISTRICT COURT OF APPEAL,
Fourth District

ROYAL AMERICAN INDUSTRIES, INC., et al.,
Petitioners,

vs.

DOLORES K. MURPHY, et al.,
Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

THORNAL, C. J., and THOMAS and CALDWELL, JJ., and TAYLOR and WILLIS, Circuit Judges, concur

ROBERTS, J., and McCORD, Circuit Judge, dissent

A TRUE COPY

TEST
SID J. WHITE
Clerk Supreme Court.

3. Denial of Petition for Rehearing by District Court of Appeal of Florida, Fourth District

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT
JULY TERM, 1966

CASE NO. 178

DOLORES K. MURPHY, JOHN E. MURPHY, HAROLD L. LANE and C. C. CALLAWAY as Co-Executors under the Last Will and Testament of M. E. MURPHY, et al.,

Appellants,

v.

ROYAL AMERICAN INDUSTRIES, INC. and JOHN D. MacARTHUR,

Appellees.

24 August 1966.

ORDERED that appellees' petition for rehearing filed 10 August 1966 is hereby denied.

A TRUE COPY

THOMAS THATCHER
CLERK

cc: Jones Adams Paine & Foster
O'Connell & Cooper
English McCaughan & O'Bryan
Scott McCarthy Preston & Steel
Burns Middleton Rogers & Farrell

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B. POINTS INVOLVED

POINT I

THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, IS IN DIRECT CONFLICT WITH THE FOLLOWING PRIOR DECISIONS OF THE SUPREME COURT OF FLORIDA REGARDING THE LEGAL DEFINITION OF "CONSIDERATION": **MANGUS v. PRESENT**, 135 So. 2d 417 (Fla. 1961); **TAMPA NORTHERN R. CO. v. CITY OF TAMPA**, 104 Fla. 481, 140 So. 311, 141 So. 298 (1932); **GUNBY v. DREW**, 45 Fla. 350, 34 So. 305 (1903); **ROBINSON v. HYER**, 35 Fla. 544, 17 So. 745 (1895); **SPANN v. BALTZELL**, 1 Fla. 301 (1847).

(The conflict with these decisions arises from the District Court's holding that there was no consideration to support the change or modification of the contract when in fact the necessary elements of consideration were present to meet the requirements of these cases.)

POINT II

THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, IS IN DIRECT CONFLICT WITH THE FOLLOWING PRIOR DECISIONS OF THE SUPREME COURT OF FLORIDA REGARDING THE ESSENTIAL ELEMENTS OF "ESTOPPEL": **STEEN v. SCOTT**, 144 Fla. 702, 198 So. 489 (1940); **ENSTROM v. DUNNING**, 136 Fla. 253, 186 So. 806 (1939).

(The conflict here arises in two respects, i. e., the District Court's determination that Plaintiffs were not estopped because they received no benefit, and secondly that the case cited as the controlling precedent by the District Court does not stand for the principle of law attributed to it.)

POINT III

THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, IS IN DIRECT CONFLICT WITH THE FOLLOWING PRIOR DECISIONS OF THE SUPREME COURT OF FLORIDA REGARDING PROOF OF "WAIVER": **MACINA** v. **MAGURNO**, 100 So. 2d 369 (Fla. 1958), and **MASSER** v. **LONDON OPERATING CO.**, 106 Fla. 474, 145 So. 72 (1932).

(The conflict arises here in two respects, i. e., the showing of an intentional relinquishment of a known right does not have to be express, as held by the District Court, but may be inferred from conduct or acts putting one off his guard and leading him to believe that a right has been waived; and secondly, the case cited as controlling precedent by the District Court does not stand for the principle of law attributed to it.)

POINT IV

THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, ABANDONED ITS PROPER APPELLATE FUNCTIONS BY RE-WEIGHING AND RE-EVALUATING THE EVIDENCE, IN DIRECT CONFLICT WITH THE FOLLOWING PRIOR DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL: **TREASURE, INC. v. WHITE STAR REALTY CO.**, 101 So. 2d 866 (Fla. 1958); **FIRST ATLANTIC NATIONAL BANK OF DAYTONA BEACH v. COBBETT**, 82 So. 2d 870 (Fla. 1955); **CUTRI ENTERPRISES, INC. v. PAN AMERICAN BANK OF MIAMI**, 115 So. 2d 592 (2d DCA Fla. 1959); **CAROLINA LUMBER CO. v. DANIEL**, 97 So. 2d 156 (1st DCA Fla. 1957); **PERRY v. PERRY**, 97 So. 2d 152 (3d DCA Fla. 1957); **SALTER v. KNOWLES**, 97 So. 2d 138 (2d DCA Fla. 1957).

(The conflict arises here because the District Court of Appeal made its own independent findings of fact and substituted its judgment for that of the Chancellor, rather than confining its review to a determination of whether the decision of the Chancellor was supported by competent substantial evidence, as required by the law of Florida and rules of this Court.)

POINT V

THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, PRECLUDING THE CHANCELLOR FROM RULING ON DEFENSES RAISED AT THE TRIAL BUT NOT DECIDED BY THE TRIAL COURT, IS

IN DIRECT CONFLICT WITH THE FOLLOWING PRIOR DECISIONS OF THE SUPREME COURT: MACINA v. MAGURNO, 100 So. 2d 369 (Fla. 1958); JOHNSTON v. JOHNSTON, 122 Fla. 372, 165 So. 698 (1936); McEWEN v. SCHENCK, 108 Fla. 119, 146 So. 839 (1933); STORY v. FIRST NATIONAL BANK & TRUST CO., 103 Fla. 399, 139 So. 179 (1931).

(The conflict arises here in that the defenses of waiver and estoppel were never decided by the trial court, yet the District Court directed the trial court to enter judgment for Respondents, thereby precluding the trial court from passing on these defenses, contrary to the law of Florida and rules of this Court.)

C. EXCERPT FROM STATEMENT OF THE CASE

In its decision, the District Court ruled on all three of Petitioners' defenses as follows:

(1) There was no consideration to support the modification of the contract; (A 6-7)

(2) There was no estoppel in that Plaintiffs (Respondents) received no benefit from the signing of the investment letters; (A 7)

(3) There was no waiver in that there was no showing of an intentional relinquishment of a known right. (A 7)

5. Excerpts from Petitioners' Brief before the District Court of Appeal of Florida, Fourth District

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Kreiss Potassium Phosphate Co. v. Knight(1929) 98 Fla. 1004, 124 So. 751 — 6

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Rader v. Prather(1930) 100 Fla. 591, 130 So. 15 — 6

United States Casualty Co. v. Godwin(1946) 158 Fla. 64, 27 So.2d 612 — 7

B. POINTS INVOLVED ON APPEAL

Appellants pose three questions which they deem to be the Points Involved in this appeal. We do not agree that the Points, so phrased, fairly present to this Court the real nub of the legal proposition before this tribunal. Mindful as we are of the limited right of review where an appellant seeks to reverse a trial Court's legal conclusions, and particularly where appellants would reverse the Chancellor's resolution of conflicting testimony, it appears to us the only real Point involved here is an extremely simple one, viz:

> WAS THERE COMPETENT SUBSTANTIAL EVIDENCE BEFORE THE TRIAL COURT TO SUPPORT THE LEGAL CONCLUSION REACHED IN THE FINAL DECREE?

The lower Court decided which of the witnesses he was going to believe, and, based on such resolution of conflicting testimony, reached a conclusion indicating that the affirmative defenses of the appellees had been established as a matter of law. The lower Court's judgment was, we contend, the only correct one.

6. Respondents' Assignments of Error filed in the Circuit Court of Fifteenth Judicial Circuit of Florida, in and for Palm Beach County

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY. IN CHANCERY NO. 63 Ç 1097-B

DOLORES K. MURPHY, JOHN E. MURPHY, HAROLD L. LANE and C. C. CALLAWAY as Co-Executors under the Last Will and Testament of M. E. MURPHY, M. A. RAMSEY, ROBERT ELMORE, JOSEPH C. MACKEY, WILLIAM ATWILL, JR., and GEORGE KENNEDY,
Plaintiffs,

vs.

ROYAL AMERICAN INDUSTRIES, INC. and JOHN D. MacARTHUR,
Defendants.

Plaintiffs, DOLORES K. MURPHY, JOHN E. MURPHY, HAROLD L. LANE and C. C. CALLAWAY as Co-Executors under the Last Will and Testament of M. E. MURPHY, M. A. RAMSEY, ROBERT ELMORE, JOSEPH C. MACKEY, WILLIAM ATWILL, JR. and GEORGE KENNEDY (originally the Defendants in the above styled action), file this their Assignments of Error and say:

1. The Lower Court erred in making and entering that certain "FINAL DECREE" dated January 5, 1965, and filed in the offices of the Clerk of the Circuit Court of Palm Beach County, Florida, on January 5, 1965, and re-

corded in Chancery Order Book No. 306 at Page 7 of said Circuit Court.

2. The Lower Court erred in rendering the Final Decree in the defendants' favor on the ground that the agreement of August 1, 1962, had been modified.

3. The Lower Court erred in its finding in said Final Decree that the agreement of August 1, 1962, was modified in writing at the closing with reference to the stock being freely tradeable and the time element of its registration.

4. The Lower Court erred in its finding in said Final Decree that at the time of the closing, the plaintiffs stated that they received the stock for investment purposes, with no present intention of selling or otherwise disposing of the same.

5. The Lower Court erred in its said Final Decree in failing to recognize that at the time of the closing, the plaintiffs accepted the stock subject to their rights under the agreement of August 1, 1962.

6. The Lower Court erred in its finding in said Final Decree that since there was no "present intention" of selling or disposing of the stock by the plaintiffs, the time element for registration was rendered indefinite.

7. The Lower Court erred in its finding in said Final Decree that Royal American proceeded with diligence in registering the stock.

7. Opinion Letter from Simpson, Thacher & Bartlett to Royal American Industries, Inc.

September 27, 1962

Royal American Industries, Inc.,
1001 Park Avenue
Lake Park, Florida

Dear Sirs:

You have requested our opinion as to whether or not the issuance of 438,101 shares of Common Stock of Royal American Industries, Inc. (the Company) to six of the present stockholders of Fort Pierce Port & Terminal Co. requires registration under the Securities Act of 1933, as amended (hereinafter called "Registration").

Our understanding with respect to this transaction, based on information supplied to us by representatives of the Company, is as follows:

The Company proposes to issue 438,101 shares of its Common Stock to six stockholders of Fort Pierce Port & Terminal Co. (Fort Pierce) in exchange for the 1,293,980 shares of Fort Pierce stock owned by those stockholders. The Company has agreed to provide financing arrangements with respect to the payment of $383,371 of Fort Pierce liabilities and has advanced the sum of $74,000 against these liabilities and an additional $25,000 of working capital. The stock of the Company will be issued on a "restricted basis" for investment and the Compay has agreed to proceed with the Registration of the stock of the Company within sixty days after the closing of the trans-

action. If such Registration is not effected within six months after the closing, the six stockholders have a right to demand redemption by the Company or by Mr. MacArthur of the stock of the Company at $2.50 per share. The Fort Pierce stock is presently held in escrow.

Our opinion is also based on the further understanding that:

(a) Since the Company issued an aggregate of 14,725,287 shares of its Common Stock to John D. MacArthur, Bankers and American Airmotive Corporation (the "Principal Stockholders") on December 22, 1961 in consideration for the conveyance to the Company of certain real property, the Company has not issued any shares of its Common Stock and the Principal Stockholders have not transferred or otherwise disposed of any shares of the Common Stock of the Company, except that one or more of the Principal Stockholders loaned certain shares of the Company's Common Stock to the Company for issuance for investment to certain stockholders of Southern Realty & Utilities Corp., and Bankers transferred Common Stock of the Company to three employees of Bankers who agreed to acquire such shares for investment.

(b) The Company does not contemplate the issuance in the near future of any shares of its Common Stock to persons acquiring such shares for investment in connection with transactions related to the transaction first outlined above, except that the Company does contemplate the issuance in the near future of an aggregate of 1,586,000 shares of its Common Stock in connection with two unrelated transactions. This understanding is based on the further assumption that the Securities and Exchange Commission

does not consider all or any of such transactions integrated so as to require Registration of any or all of the shares involved in such transactions. As we have previously advised you, if the Securities and Exchange Commission considers the above transactions to be parts or portions of a single integrated offering, it may require the Company to file a registration statement covering some or all of such transactions, and in addition it may require the Company to make a rescission offer. It is our further understanding that the Company contemplates the Registration of certain of the shares to be issued in connection with the transaction outlined above and of additional shares of its Common Stock to be issued in connection with transactions not related to those referred to above.

Based on the foregoing, we are of the opinion that the issuance of the Company's Common Stock in connection with the transaction outlined above will not require registration under the Securities Act of 1933, as amended, by reason of the provisions of Section 4(1) thereof.

In the event authorized but unissued Common Stock of the Company is used in such transactions (instead of shares borrowed by the Company from one or more of the Principal Stockholders), a listing application must be filed and approved by the American Stock Exchange prior to the issuance of any such authorized but unissued Common Stock.

Very truly yours,

/s/ Simpson Thacher & Bartlett

8. Investment Letter

Royal American Industries, Inc.
1001 Park Avenue
Lake Park, Florida

Dear Sirs:

I hereby acknowledge receipt of certificates Nos. CU253, CU254, CU256, CU257 and CU259 through CU284, inclusive, issued in the name of M. A. Ramsey and representing an aggregate of 78,024 shares of your common stock, par value of 10c per share, all pursuant to and in accordance with the provisions of that certain Agreement dated August 1, 1962, and that certain Addendum (to such Agreement) also dated August 1, 1962, both between you, John D. MacArthur, Fort Pierce Port & Terminal Co., a Florida corporation (the "Company"), me and five other stockholders of the Company and relating to the purchase by you and the sale by me and such other stockholders of shares of the common stock of the Company.

This will also acknowledge that I have represented to and agreed with you that I am purchasing such shares for investment with no present intention of selling or otherwise disposing of the same, subject only to my rights under such Agreement and Addendum.

Yours very truly,

s/ M. A. Ramsey (SEAL)

M. A. RAMSEY

Date: November 7, 1962

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief For Respondents In Opposition and Appendix has been served upon each of the following:

ROBERT M. ERVIN
For
Ervin, Pennington, Varn & Jacobs
305 South Gadsden Street
Tallahassee, Florida

and

BURNS, MIDDLETON, ROGERS & FARRELL
205 Worth Avenue
Palm Beach, Florida

attorneys for Petitioners, by mail, this 29TH day of September, 1967.

Phillip Goldman
Attorney for Respondents

SUPREME COURT, U. S.

OCT 25 1967

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 566

ROYAL AMERICAN INDUSTRIES, INC. and
JOHN D. MacARTHUR, *Petitioners*,

v.

DOLORES K. MURPHY, et al., *Respondents*.

REPLY TO BRIEF OF RESPONDENTS

ROBERT M. ERVIN
for
Ervin, Pennington, Varn & Jacobs
305 South Gadsden Street
Tallahassee, Florida

and

Burns, Middleton, Rogers & Farrell
205 Worth Avenue
Palm Beach, Florida

Attorneys for Petitioners

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Reply to Respondents' "Reasons For Denying the Writ"

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2. & 3. THERE IS A SUBSTANTIAL FEDERAL QUESTION OF GREAT PUBLIC IMPORTANCE INVOLVED IN THE CASE AT BAR 9

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 566

ROYAL AMERICAN INDUSTRIES, INC. and JOHN D. MacARTHUR, *Petitioners,*

v.

DOLORES K. MURPHY, et al., *Respondents.*

REPLY TO BRIEF OF RESPONDENTS

This Reply Brief is filed by Petitioners pursuant to Rule 24, Supreme Court Rules. For the convenience of the Court, Petitioners' reply to the Brief of Respondents will be correlated with the portions of the Brief of Respondents to which the reply is directed.

QUESTION PRESENTED

The question presented is not fairly stated, since it is based upon a false premise that the federal question was first raised on the Petition for Rehearing in the Florida Supreme Court. As will be seen from an analysis of the proceedings in the trial court, District Court of Appeal and Supreme Court, the federal

question was first raised in the trial court, was expressly considered by the District Court of Appeal, and was not raised on the petition for writ of certiorari in the Florida Supreme Court since that would have been improper.

STATEMENT

A. The Facts

The facts as stated by Respondents in the "A" portion of their statement are practically identical with those facts stated by Petitioners in their Petition for Writ of Certiorari. Petitioners stated the facts fairly and accurately, and since Respondents' Statement of the Facts is almost identical, it is apparent that Respondents' critical remarks about the statement are unfounded.

B. The Proceedings in the Trial Court

A vast amount of testimony was presented in the trial court by Petitioners regarding the exempt nature of the transaction under the Securities Act of 1933 and the Securities and Exchange Act of 1934 and the effect of the investment letters which were signed by Respondents at the time of closing. All of this testimony dealt with the Securities Act of 1933 and the Securities and Exchange Act of 1934 and the rules and regulations promulgated by the Securities and Exchange Commission. The complete testimony of William G. Dillon, securities expert who testified on behalf of Petitioners, is contained in Volume III of the Record, pages 43-96. Excerpts from this testimony, consisting of that portion which was given on direct examination, is included herein in Appendix A (R. Vol. III, pages 43-

66; 89-96; Appendix A, pages 14-45). It will be noted that the substance of this testimony was that under federal law, the fact that the stockholders accepted the share certificates bearing the restrictive legend and also executed the investment letters indicated that it was the intention of all of the parties to the transaction that this was a *private offering*, not requiring registration with the Securities and Exchange Commission.

The trial court, in entering its decree in favor of Petitioners, did not rest its decision on the federal question which was raised by the testimony referred to above as to the exempt status of the transaction under federal law. Instead, the Chancellor based his decision on state law, finding that the original contract was subsequently modified by new agreements of the parties as evidenced by Respondents' acceptance of stock certificates with the legend on each restricting tradeability and the simultaneous execution by Respondents of investment letters acknowledging that each Respondent had received the stock for investment purposes with no present intention of selling or otherwise disposing of the same. The Chancellor further concluded that this modification of the contract altered the condition in the original contract with reference to the stock being fully tradeable as well as the time element of registration. This discharged Petitioners from the responsibility of paying Respondents Two and 50/100 Dollars ($2.50) per share for their 439,768 shares of Royal American stock as sought by Respondents. (R. Vol. I, pages 107-108; Appendix B of Petition for Writ of Certiorari, pages 26-27.)

It is true that the Final Decree was devoid of any reference to federal law since the Chancellor bottomed his decision on Florida law without reaching the federal question. However, it is not true, as Respondents would lead this Court to believe, that the federal question was not raised and asserted very

strongly in the trial court. The testimony of William G. Dillon, attached hereto in Appendix A, squarely refutes this statement of Respondents.

C. The Proceedings in the District Court of Appeal

Since the Chancellor had not based his decision on the federal question, the Respondents (Appellants in the District Court) did not raise this issue in their appeal. Having failed to raise this issue on their appeal, it would have been improper for Petitioners (Appellees in the District Court) to raise the issue in their brief since proper appellate practice dictates that appellees' brief is to be responsive to the brief of appellants. Hence, the federal question as raised in the trial court was not briefed nor argued in the appellate court. Petitioners have not yet had a hearing nor opportunity to brief the federal question on its merits at the appellate level.

The District Court, in reversing the Chancellor, did *not* base its decision upon applicable Florida law, as Respondents have asserted in their brief. Indeed, reference to the opinion of the District Court of Appeal will disclose that the District Court attempted to inquire into and interpret the Securities Act of 1933 and the Securities and Exchange Act of 1934 and came up with a holding that:

> "Under the circumstances the contract of August first could have been closed by delivery and exchange of the stock only in violation of the Securities Act, supra, in that it had not been registered in compliance with either of the said acts. The receipt reciting an intention not to dispose of said stock was executed at the request of Royal American in an effort to avoid such violation." (R. Vol. IV, pages

1-5; Appendix B of Petition for Writ of Certiorari, page 22.)

The District Court, having reinjected the federal question into the case on appeal, notwithstanding that the only issues before the appellate court dealt with state law, and having pronounced its ruling as to what it deemed to be a proper application of federal law, then summarily dismissed or ignored the real efficacy of the investment letters by holding that they were merely executed at the request of Royal American in an effort to avoid a violation of federal law. Furthermore, the District Court, while recognizing that the transaction could qualify for the private offering exemption only "if it could be said that the securities were acquired by the purchasers for purpose of investment and with no present intention to dispose of same" (R. Vol. IV, Page 4, Appendix B of Petition for Writ of Certiorari, page 22), nevertheless held that this "investment intent" need not be a bona fide intent to hold the securities for an indefinite period, but that an intent to hold the securities for a six (6) months period pending registration would suffice (R. Vol. IV, pages 3-4; Appendix B of Petition for Writ of Certiorari, page 21).

Thus, it may be seen that, contrary to the assertion by Respondents, the District Court of Appeal bottomed its decision squarely upon the substantial federal question of the legal effect of the federal securities law on the closing of this stock transaction. Since this was done by the District Court without the benefit of briefs or argument of counsel on the federal question, Petitioners have been denied due process of law as guaranteed to them by Section 1 of the Fourteenth Amendment to the United States Constitution.

D. The Proceedings before the Supreme Court of Florida

Petitioners did not raise the federal question in their Petition for Writ of Certiorari to the Supreme Court of Florida as that Petition was directed solely to showing jurisdiction in the Supreme Court of Florida under the Florida Constitution governing conflict certiorari.[1] Indeed, the Florida Appellate Rules, Rule 4.5c(6), provide that the petition shall be directed solely to the issue of jurisdiction, without going into the merits of the cause. Since there were no other Florida cases construing the Securities Act of 1933 and Securities and Exchange Act of 1934 relative to a question such as was involved in the case at bar, there was no conflict in the area of federal law with respect to Florida court decisions, and it would have been improper to raise the federal question there. Petitioners' petition to the Supreme Court of Florida was solely within the ambit of the Florida Constitution and Florida Appellate Rules regarding conflict certiorari.

The Florida Supreme Court, holding that it lacked jurisdiction over the cause (in that the decision of the District Court was not in direct conflict with any decision of another Florida District Court of Appeal or of the Supreme Court of Florida on the same point of law), denied Petitioners' application for a writ of certiorari (R. Vol. IV, page 7). When Petitioners filed their Petition for Rehearing to the Florida Supreme Court, they elaborated on the substantial federal question involved, not "as

1. Article V, Section 4 of the Florida Constitution provides, in part, as follows:

"The Supreme Court may review by certiorari any decision of a District Court of Appeal...that is in direct conflict with the decision of another District Court of Appeal or of the Supreme Court on the same point of law... ."

a last resort", but rather in an attempt to demonstrate to the Supreme Court of Florida that the District Court had erred grievously with respect to a substantial federal question. As previously noted, the Florida Supreme Court denied the Petition for Rehearing without opinion, based upon lack of jurisdiction. (R. Vol. IV, page 8.)

REPLY TO RESPONDENTS' "REASONS FOR DENYING THE WRIT"

1. THE FEDERAL QUESTION WAS FIRST RAISED IN THE TRIAL COURT BY EXTENSIVE TESTIMONY OF PETITIONERS, AND WAS ALSO EXPRESSLY CONSIDERED AND PASSED UPON BY THE DISTRICT COURT ON APPEAL.

This is more than adequate, therefore, to provide a basis upon which this Court has jurisdiction to review a decision of a state court.

Petitioners' contention that the federal question was properly and timely raised in the trial court is amply borne out by a review of the testimony of William G. Dillon, expert securities attorney, as set forth in Appendix A herein. The fact that the trial court based its decision on non-federal grounds is wholly insufficient to deprive this Court of its jurisdiction to review the decision of the state court. This Court has held that on Petition for Certiorari to review a decree of a state court as denying or not duly recognizing a federal right set up therein, it is the Supreme Court's province to inquire not only whether such right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision. *Ancient Egyptian Arabic Order of Nobles of the*

Mystic Shrine v. *Michaux*, 279 U.S. 737, 49 S.Ct. 485, 73 L.ed. 931 (1929). Thus, the fact that the federal question was timely presented to the trial court is sufficient in and of itself to give this court jurisdiction to review the cause.

However, there is another and perhaps more compelling circumstance to support Petitioners' position. As set forth above, it is apparent that the District Court re-injected the federal question on appeal and expressly considered it there, even though neither of the parties briefed this point for it. This Court has also held that where federal questions are passed on by state appellate courts, it is immaterial whether the federal questions were raised in the state's trial court. *Home Insurance Company* v. *Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.ed. 926 (1930). This case, and others of similar import, constitute a well-recognized exception to the rule which Respondents have asserted as a rigid rule governing the jurisdiction of this Court. As a matter of fact, one of the cases cited by Respondents on page 8 of their Brief actually supports Petitioners' position since it, too, involved exceptional circumstances similar to those in the case of *Home Insurance Company* v. *Dick*, supra. In the case of *Whitney* v. *California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.ed. 1095 (1927), the plaintiff in error had been convicted of violation of a state law, and her conviction had been affirmed by the District Court of Appeal of California. The case was then brought to the United States Supreme Court on Writ of Error, and on the first hearing in the United States Supreme Court, the Writ of Error was dismissed for want of jurisdiction. 269 U.S. 530, 46 S.Ct. 22, 70 L.ed. 396. Thereafter, Petition for Rehearing was granted by the Supreme Court and the case was again heard and reargued both as to the jurisdiction and the merits.

On reargument, the state of California again urged that the federal question had not been timely presented to the trial court.

This Court stated the general rule to be as set forth on page 8 of Respondents' Brief. However, the Court went further and noted that in the *Whitney* case, supra, a certificate had been obtained from the state appellate court indicating that it had considered and necessarily decided the federal question. The court then held that the *Whitney* case, supra, fell within the exception to the general rule, and further held that since the federal question was considered and passed upon by the state appellate court, the U.S. Supreme Court had thereby acquired jurisdiction under the Writ of Error. 274 U.S. 357 at 362. In support of this holding, the Supreme Court cited a long line of cases applying the exception to the general rule.

Respondents' first point that the federal question was not timely raised is wholly without merit. It was expressly raised in the trial court, and the District Court of Appeal expressly considered and passed upon the question, thereby giving this Court jurisdiction to review the case.

2. and 3. THERE IS A SUBSTANTIAL FEDERAL QUESTION OF GREAT PUBLIC IMPORTANCE INVOLVED IN THE CASE AT BAR.

Although Respondents have treated these as two separate points in their Brief, because of the close interrelationship between the points, coupled with the fact that Petitioners covered these points more than adequately in their original Petition, Petitioners' reply will be directed to the two points jointly.

In the United States today, literally thousands of securities transactions take place each day. If the transaction involves any interstate communication or use of the mails, the Securities Act of 1933 requires that the securities involved be registered with

the Securities and Exchange Commission prior to the transfer, with certain exceptions or exemptions. As Petitioners pointed out in their original Petition, the "private offering exemption" has come to be the most widely used exemption in the federal securities laws. Furthermore, the investment letter, as involved in the case at bar, has come to be an integral feature of private offerings.

It was never intended that investment letters should be used by individuals as a ruse or as a device to circumvent federal laws regarding registration. When used properly, as set forth in more detail in the original Petition for Writ of Certiorari, the investment letter is entirely legal and proper so long as the transferee takes the stock with a bona fide intent to hold the same for investment purposes with no present intention of selling or otherwise disposing of same.

Both the federal courts and the Securities and Exchange Commission have expressly held that where a purchaser of securities under an investment letter acquires the securities with an intention to hold them for the six (6) months "capital gains period", or to hold them for deferred sale, or to hold them for a market rise, or to hold them for one (1) year does not constitute a statutory basis for the private offering exemption from the registration requirements of the 1933 Act. *Gilligan, Will & Co.* v. *Securities and Exchange Comm'n.*, 267 F.2d 461 (2d Cir.) *cert. denied*, 361 U.S. 896 (1959); *Re: The Crowell-Collier Publishing Company*, SEC Securities Act Release No. 3825 (August 12, 1957).

The decision of the District Court of Appeal of Florida is diametrically opposed to these federal decisions and, if allowed to stand, would most assuredly create a dangerous precedent in the field of securities exchanges and would at the same time

impute to both Petitioners and Respondents an intent to commit an unlawful act at the time that the exchange of stock was consummated.

For the foregoing reasons, together with the reasons set forth in the Petition for Writ of Certiorari, this Petition should be granted.

Respectfully submitted,

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PETITIONERS' APPENDIX A

APPENDIX A

Excerpts of Testimony of
William G. Dillon in the Trial Court
(R. Volume III, pgs. 43-66, 89-96)

WILLIAM G. DILLON,

called as a witness for and in behalf of the cross-defendant, after being first duly sworn, in answer to questions propounded, testified as follows:

DIRECT EXAMINATION

BY MR. PRUITT:

Q Would you please state your name, please?

A William G. Dillon.

Q Where do you live, Mr. Dillon?

A 165 Longhill Drive in Short Hill, New Jersey.

Q What is your occupation, sir?

A I am an attorney.

Q With whom are you associated?

A I am a member of the firm of Simpson, Thacher and Bartlett, 120 Broadway, in New York.

Q Mr. Dillon, do you have a specialty?

A I engage in the general practice of law with a specialized practice in the field of corporations, securities and exchange, stock exchange matters.

Q How long have you appeared in securities exchange and stock exchange matters?

A Since 1948.

Q Have you been involved in registration with the American Stock Exchange?

A On many occasions.

Q And have you been involved with registration of stock with the Securities Exchange Commission?

A On many occasions.

Q And you have appeared before the Commission?

A Yes, I have.

Q You are familiar with the rules and regulations of the Securities Exchange Commission?

A I am generally familiar with them, yes.

Q And the American Stock Exchange?

A Yes, I am.

Q Mr. Dillon, your deposition was taken yesterday?

A That's correct.

Q And at that time the question was put to you concerning the stock that was transferred to the Fort Pierce Stockholders. That is the Royal American Stock, whether or not it was included in the initial registration with the SEC, and your answer was that you had to figure up some things?

A I recall that question, Mr. Pruitt, and yesterday at the conclusion of the deposition I reviewed the various filings of the registration statement. The initial one which took place in May of 1963, the second in October of 1963 and the third one in December of 1963, and my examination of those registration statements revealed that my recollection given at the deposition yesterday was faulty.

The stock originally issued to the controlling stockholders of Fort Pierce was included in the first filing of the registration statement. The one in May of 1963.

Q Now, are you acquainted with Royal American Industries?

A Yes, I am.

Q What is your connection, sir, with Royal American Industries?

A I am—my firm is general counsel for Royal American, and I am also a director and an officer of the company.

Q Do you own any stock in the corporation?

A No, I don't, but I believe my wife does.

Q Mr. Dillon, does—what is necessary to register stock with the American Stock Exchange?

A The preparation and filing with the American Stock Exchange of what is known as a listing application, and when that listing application meets with the approval of the listing committee and ultimately the Board of Governors of the American Stock Exchange, then the stock is considered listed or registered with the American Stock Exchange.

Q All right. What is necessary to register stock with the Securities Exchange Commission?

A In order to register stock with the Securities Exchange Commission a registrant must prepare and file what is known as a registration statement. Following forms prescribed by the Securities Exchange Commission. The members of the staff of the Commission then carefully review that, frequently over an extended period of time, offer their comments to the registrant and its' counsel, and accountants and ultimately when all of the SEC's comments are met to the satisfaction of the staff, the Securities and Exchange Commission permits the registration statement to become effective, and that constitutes an offering of stock; not stock as such, but an offering of stock.

Q Could you, sir, explain for us the difference between stock and an offering of stock?

A Well, it is an important concept, and the Security Act of 1933 requires only the registration of the offerings of stock. In other words, you cannot register a block of stock and then do nothing with it. You must register an offering of stock.

Q So, once it is registered it must be offered?

A Well—

Q Or is offered?

A Well, there again customarily, of course, it is in the usual case—it is offered immediately upon becoming registered.

Q Are you familiar, sir, with transactions wherein stockholders in one company will trade their stock in that company for stock in another corporation?

A Yes, I am.

Q Can this be done without the stock being registered with the Securities Exchange Commission?

A Well, basically there would be two ways to do it. One would be for the issuer of the stock, the company issuing the stock or the controlling person issuing the stock to prepare and file a registration statement with the SEC and process that, and have it become effective, and in that event you could deliver registered stock. The other basic alternative is to avail yourself of one of the several exceptions under the Securities Act of 1933.

The most commonly used exception, I would say, is the so-called private offering exception, and if you are dealing with a limited number of people and basically if those people are willing to sign what is known as an investment letter, in which they agree to acquire the stock for investment, and to hold it and not to sell, transfer, pledge or otherwise dispose of it, then in a proper fact situation that constitutes an excepted transaction under the '33 act, and under those circumstances it is proper to issue the stock.

Q Generally how many stockholders are we speaking of in this exception?

A It is a limited number and each fact situation must be examined. It is a difficult question to generalize about, but if I were asked to pick a figure which is involved in many private transactions, I would say that many private transactions involve 20 people or less.

Q Is there a written rule concerning a number of stockholders?

A I know of no written rule. There are a number of opinions of the Securities and Exchange Commission dealing with situations where they have questioned whether an offering was a public offering, and should have been registered or private offering, and one that validly comes within the exception.

Q Now, for this private offering to be a legal exception, or exception transaction, it is required that the issuer receive from people an investment letter?

A The offering must truly be a bona fide private placement, and the customary piece of evidence that is required in connection with the closing of any transaction is an investment letter.

Q What is—what does the investment letter mean?

A The investment letter means initially what it says on its face. In the usual investment letter the person acquiring the stock says that he is acquiring the stock for investment for his own account, and that he intends to hold it and that he does

not intend to sell, hypothecate, pledge, otherwise transfer or dispose of it. And although you cannot find this in any published rules of the SEC, again if you look at the SEC cases—

MR. O'CONNELL: We object to the testimony of what the cases may be, and there is no actual rule. He is giving his opinion of what the cases may or may not have been, and I don't think it is applicable here.

MR. PRUITT: Giving an expert opinion.

THE COURT: An expert opinion in the field of law usually falls to the decision of the Court based upon that decision.

MR. PRUITT: Judge, he is not talking about judicial decisions or opinions. He is talking about Securities Exchange Commission. Not Federal Court opinions.

THE COURT: Just a moment. I appreciate that.

MR. PRUITT: He is testifying not as law, but as fact.

THE COURT: Well, will not the Court have to know the decisions of the Securities Exchange Commission in considering this matter?

MR. PRUITT: No, sir, I don't think so.

THE COURT: Why would I have to know what his opinion about it is?

MR. PRUITT: All he is saying is that based upon his ex-

perience with the Commission and Board, that is the way it is done.

THE COURT: I don't believe it is material, but I will let him testify and if I am certain of my position I will strike it from the record in making up my decree.

THE WITNESS: Could I have the question again?

(Thereupon, the reporter then read the witness's previous answer.)

THE WITNESS: And based on the practice of the Commission an investment letter means a holding for a period of not less than two years.

BY MR. PRUITT:

Q If a person accepts stock after signing an investment letter in a bona fide exception or exempt transaction, is it necessary for him to register that stock with the SEC at the end of the two-year period?

A Not necessarily.

Q Now—

THE COURT: For what purpose?

MR. PRUITT: To trade.

THE COURT: All right.

BY MR. PRUITT:

Q Now let me get that in the answer to it. I meant to trade it at the end of the two-year period?

A Again, Mr. Pruitt, it would depend upon the fact in the situation as to whether the person were going to make a public offering or whether he were going to engage in other private transactions. There are variations that could happen at the end of such a period.

Q It being less than a two-year period?

A Under certain circumstances, it could be.

Q Now, to be a bona fide exempt transaction, an investment letter must be signed?

A It is the fact of the matter that controls, and an investment letter is the document which is almost universally obtained in order to evidence the intent of the parties acquiring the stock.

Q Now,—or when an investment letter is obtained or signed what is done then insofar as the certificates are concerned?

A It is customary for companies to place a legend on the certificate, confirming the statements made in the investment letter.

Q Which comes first, the investment letter or the legend?

A Well, so far as the legal—legalities of it, I would say the investment letter comes first and the legend is a—as an additional element of protection from the point of view of the issuing company.

Q Evidence that investment letter has been signed?

A That's right, It is a warning to any person to whom that stock is delivered that the stock has been acquired for investment purposes.

Q Mr. Dillon, are you familiar with the stock that was traded to the Fort Pierce Stockholders in exchange for Fort Pierce stock?

A I am familiar with it, yes.

Q You had no part in the negotiations of the drawing of this agreement?

A I did not.

Q You were concerned solely with the Securities Act of Royal American and represented Royal American in that regard?

A That's right. Mr. Pruitt, I think I probably knew sometime during the period in between—I did know, to be accurate about it, during sometime—sometimes during the period between the date which appears on that contract and the closing that the transaction had taken place and that there was going to be a closing. As a matter of fact, an opinion was requested from us.

Q Now, what stock of Royal American was given to the Fort Pierce stock?

A Well, I wasn't at the closing so I don't know exactly what certificates were given.

Q Of course, I don't mean that. I mean from where?

A The shares of stock were shares of stock which were borrowed by Royal American from Bankers Life and Casualty Company.

Q Have you been familiar with these shares of stock?

A Yes.

Q Prior to this?

A Yes. Because I had worked on the transactions as a result of which Bankers Life and Casualty Company became a substantial stockholder of Royal American.

Q Were the shares of stock which were borrowed from Bankers Life and Casualty Company registered with the American Stock Exchange?

A Yes, they were.

Q Whose decision was it that these shares be used?

A Royal American's.

Q Royal American made that decision?

A Yes.

Q Could they have issued—authorized unissued shares?

A They could in my judgment very easily have used unauthorized but unissued shares. Except that they would have

had to file a listing application with the American Stock Exchange and have that be approved by the American Stock Exchange between the signing of the contract and date of the closing.

Q Now, are you familiar with the registration of the same shares of Royal American Stock with the SEC?

A Yes, I am.

Q Did you handle that, sir?

A Yes, my firm did.

Q Are those shares now registered with the Securities Exchange Commission?

A Yes, they are.

Q I will show you these exhibits—I don't seem to remember whether—no number on them. Four exhibits that have been initialed by the Court, and I ask you do you recognize those?

A Yes, I do, Mr. Pruitt.

Q What are those?

A Well, the first document is the registration statement as initially filed with the Securities Exchange Commission on May 29, 1963. And the second one is an amendment, Amendment Number 1 to the same registration statement which was filed with the SEC on October 21st, 1963.

And the third one is Amendment Number 2 with the same registration statement filed with the SEC on December 18, 1963, and next one is the file prospectus in the form in which it became effective, and it is dated December 23rd, 1963.

MR. PRUITT: We would offer those as Royal American and MacArthur exhibits, your Honor.

THE COURT: I think those were presented at pretrial. Is there any objection?

MR. JONES: Your Honor, I think we should object to it on the basis that it appears this registration was all after a six-month period, and therefore immaterial to the issues in this case. Six-month period was—expired six months after November 7th. This prospectus was filed on May 29th, I believe, 1963, which I believe is just beyond the six-month period. Therefore, it is obvious on its face as they have already admitted that they didn't get this stock registered and it now appears from this that this registration was after the six months, and therefore we object to it on that basis.

THE COURT: I will admit the stock with your objection noted, but it is admitted. Let me have it.

MR. GOLDMAN: If your Honor, please, I would like to state so that the record is clear, that we object on the same basis, except that we don't admit that the closing was necessarily November 7th. In other words, the date of the agreement was August 1st, and we take the position that this closing was either August 1st or November 7th, and that six-month period expired either February

1st or May 7th, and that this was—this registration took place practically a year or 13 months after the agreement, rather than six months.

THE COURT: Very well. I am going to admit these and mark them, the one dated May 29th, 1963 will be Defendant's Exhibit 1. And the one dated October 21st, '63 will be Defendant's Exhibit 2. One dated December 18th will be Defendant's Exhibit 3. One defined as a prospectus is Defendant's Exhibit 4.

(Thereupon, the documents referred to were marked Defendant's Exhibits Numbers 1, 2, 3 and 4 and received in evidence.)

THE COURT: Proceed.

BY MR. PRUITT:

Q Are the shares that are the subject matter of this litigation freely tradable?

A Yes, they are.

MR. JONES: You mean now?

MR. PRUITT: Now.

BY MR. PRUITT:

Q Have been ever since the SEC approved this registration?

A Correct.

Q It was not necessary to go back and re-register a list with the American Stock Exchange?

A No. It was not.

MR. O'BRYAN: I object to the question as an obvious leading question and counsel is doing more testifying than the witness.

THE COURT: Well, I will overrule the objection. Proceed.

BY MR. PRUITT:

Q Mr. Dillon, when a bona fide exempt transaction under the '33 Act is consummated and an investment letter is signed, is it necessary to register the stock with the Securities Exchange Commission?

A No, it is not.

MR. JONES: I didn't get that question. Will you repeat it? Let me see what the—

(The Court reporter then read the pending question.)

MR. PRUITT: You may inquire.

CROSS-EXAMINATION

BY MR. JONES:

Q Now, Mr. Dillon, I believe you said that you took part in

the preparation of the original listing of the stock that is involved in this transaction on the American Stock Exchange?

A I did take part in that listing.

Q I hand you, please, sir, what we have marked as Exhibit Number 1 for identification yesterday, purporting to be listing application Number—whatever that number is. It is 4135. And see if you can identify that?

A Yes, I can identify this. As I said yesterday, there is a possibility that there is a supplemental letter to stockholders listing—but it is not significant. This is a listing application.

Q And that application was prepared by your firm or under the supervision of your firm?

A Yes, it was.

Q And specifically by you or under your supervision?

A That's correct.

Q And you furnished the opinion of counsel?

A Yes, I did.

Q Now, this purports to list 14,707,428 shares of stock for issuance to John D. MacArthur and Bankers Life and Casualty and American Airmotive pursuant to an agreement. Now, that is—I will put it this way: The stock that was offered to the stockholders of Fort Pierce was actually part of the stock which was held by Bankers and loaned to the Royal American for this transaction?

A That's correct.

Q Now, included in this application is a title headed Registration on Securities Act of 1933. Is that correct?

A Yes.

Q Mr. Dillon, was the stock issued to Bankers Life and Casualty Company and these others freely tradable?

A No, it was not.

Q I call your attention to a legend contained or advice contained in this as follows: "In the opinion of counsel for the corporation, the issuance of the shares of common stock applied for herein will be exempt from the registration requirements of the Securities Act of 1933 under the second clause of Section 4 (1) of said Act."

Now, what you mean by that is that because that was a private transaction—

A That offering was.

Q That particular offering was a private transaction?

A That offering to Bankers Life.

Q But even though it was a private transaction it was still not freely tradable stock unless it got registered on the Securities and Exchange Commission, was it?

A That stock has not been registered on the Securities Exchange.

Q But I am asking the question: This stock here could not have been traded under the registration with the American Exchange because it was—even though it was exempt under Section 4 (1) of the Securities Act of '33 because it was not registered with the Securities Exchange Commission?

A It was an exempt transaction and therefore it was not registered with the Securities Exchange Commission.

Q But it could not still have been transferred until it was registered?

A No, because it was taken as investment stock.

Q That's right. So that when you have an exempted transaction and take it as investment stock it is not freely tradable?

A Definitely not.

Q That's right. And that is why you put in here this statement: "The shares so to be issued will bear the following legend: The shares represented by this certificate had not been registered under the Securities Act of 1933. The shares have been acquired for investment and may not be sold, transferred, pledged or hypothecated in the absence of an effective registration statement for the shares under the Securities Act of 1933."

And you so advised the Royal American people that this was true, is that right?

A Yes, I did.

Q Now, what would happen if Royal American decided to go on and deal in that stock anyhow?

A If Royal American decided to deal in that stock?

Q Yes, sir.

A Well, Royal American would have to evaluate the transaction in which it proposed to deal in the stock, and it would depend entirely upon the terms of any given transaction.

Q Okay. What would happen to Bankers Life and Casualty, who took it under investment letter with that legend on it if they undertook to deal with it?

A My answer would be the same. I would depend upon the transaction.

Q Both would be in violation of the law unless they were dealing again with another private issue, is that right?

A Or another exemption under the Securities Act or registered with the Securities and Exchange Commission.

Q In other words, they have got to go back to a private transaction or they have got to register?

A There are other exemptions.

Q I know. But those are the two we are talking about now?

A Correct.

Q Now then, do I understand that Royal American borrowed from Bankers Life and Casualty Company this stock bearing this legend for the purpose of either conveying this stock or re-issuing stock to the stockholders of Fort Pierce?

A It was the latter.

Q For the purpose of re-issuing it?

A Yes.

Q Okay. Now, in order for Royal American then to issue that stock they had to comply with either an exemption or they had to register under the Securities Act?

A Royal American acting properly, of course, had to be satisfied that it was issuing stock validly and in a proper and legal manner.

Q But you didn't answer my question. My question is for Royal American to transfer or re-issue stock which they had borrowed, and maybe they intended to replace it, nevertheless in order to do it they had to either come within an exemption or they had to register it with the Securities Act?

A That's right.

Q All right. Now, suppose Royal American under those circumstances without putting—suppose Royal American had tried to transfer without going through the Securities and Exchange Act. The other alternative was to do it on the basis of an exemption or they would be in violation of the law, wouldn't they?

A That is correct.

Q So that in order to get a transaction which was exempted, one of the methods of doing it would be to deal with an offering which is not public and that is the procedure which you thought you were following at that time?

A Well—those are the proceedings which were followed in this transaction, because I have seen the file and I know that was what was authorized.

Q That is what you intended to do was make a non-public offering to these Fort Pierce stockholders?

A Well, I had nothing to do with the negotiations of the transaction.

Q Well, you were an officer of company?

A True, but I don't want to express any opinion as to the—any intent that goes back to the negotiation stage. So far as the closing of the transaction goes, it was Royal American's definite policy to comply with the law and naturally the company didn't want to issue stock certificates unless it advised that it were in compliance with the Federal Securities Law.

Q So that if and when you undertake to make an exempted offering as a non-public offering you do it so by—by putting a legend on the stock and taking an investment letter, don't you?

A Well, I don't mean to be pickey, but that may be putting the cart before the horse. Actually you get the investment letter and then the legend is placed on the stock as evidence of the fact that it was a private transaction.

Q I see. Now then would you explain to me why Royal American would come in with the stock with the legend already on it and the letter to be signed at the same time if you get the investment letter first?

A I wasn't at the closing.

Q You don't know?

A I don't know.

Q All right. Now then, let's go back to one other statement that you made. You said, as I recall, that even under an investment letter, stock held under investment letter, it is not necessary to register it in order to sell it?

A That is correct.

Q In other words, that person can—if he has got a legend on it can violate the law and sell it regardless, he can take the consequences of it?

A He could.

Q Or he could?

A He could violate the law, yes.

Q Now, if he sold it with that legend on it he would be in violation of the law unless he could get an exemption, wouldn't he?

A Well, I assume so.

Q All right. Now, if there was an understanding that the stockholders taking this would have a right to sell it back to Royal American, that would be a private transaction exempted under the Securities Act, wouldn't it, because Royal American would be one person buying back the stock that they had issued?

A If they bought it back pursuant to exemption under the Securities Act, right.

Q Now then, we have got a situation, as I understand it, that Royal American Industries borrowed from Banker's Life and Casualty Company, X-number shares of stock which had a legend on it, which under your opinion it could not be sold, transferred, pledged or otherwise disposed of except in the absence of a letter of investment. And they took that stock back in and they issued other stock to the stockholders and delivered it to them with a legend and an investment letter arrangement.

A May I see that, please?

Q Yes, sir.

A Mr. Jones, you didn't read all of this. It says or opinion of counsel.

Q All right. Now, did you give an opinion of counsel?

A I gave—

Q That it was not required under the Act?

A I did.

Q I thought yesterday you testified under deposition that you did not?

A I have no recollection of so testifying.

Q Do you have that opinion?

A I would be perfectly happy to have my recollection refreshed.

Q Do you have that opinion? Was it written?

A Which opinion are we now talking about?

Q I am referring to the one in which you said it could be done either by registration or under opinion of counsel.

A Prior to proposed transaction.

Q Would you please clarify me on what we are talking about? It can be done borrowing back the stock—

A All I am—

Q You borrowed this and said you wanted to read it and I hadn't read far enough. Now, what do you mean by that is what I am trying to find out?

A What—

Q I don't know—I don't know how to ask you any more. It is true, isn't it, that this stock which was given to the Fort Pierce stockholders with the legend and under that investment letter was not freely tradable by them?

A It definitely was not. They signed an investment letter and it definitely was not tradable.

Q Okay. Now, were you aware of the fact that the investment letter referred back to this agreement which said it was taken subject to the terms of the agreement?

A Well, as I testified yesterday at the deposition, I looked at certain of the files relating to this transaction a few days before coming down here and I did note that provision at the end of the investment letter.

Q All right.

MR. JONES: We would like to mark for identification the listing application Number 4135 which has been identified.

THE COURT: You object to it being out of order?

MR. O'CONNELL: For identification only.

THE COURT: I didn't say that. I said did opposing counsel object to it being admitted out of order.

MR. PRUITT: No, sir.

THE COURT: It is admitted. It is Plaintiff's Exhibit Number—do you have an exhibit down there?

MR. JONES: We had the investment letters, which I believe they are all there.

THE COURT: I have got six. Was there another?

MR. GOLDMAN: You made the contract seven.

THE COURT: That's correct. This will be Plaintiff's Exhibit Number 8.

(Thereupon, the document was then received into evidence as Plaintiff's Exhibit Number 8.)

MR. JONES: I have no further questions.

* * *

REDIRECT EXAMINATION

BY MR. PRUITT:

Q Mr. Dillon, at the time of your September 27th, '62 letter, you say some facts were related to you over the telephone. Did you have a contract before you at that point?

A I don't believe I did.

Q Have you since read this contract?

A Yes, I have.

Q You are familiar with it now?

A Yes, I am.

Q Would the language of the contract—was that what was related to you over the telephone?

MR. O'CONNELL: We object as immaterial and irrelevant. He is an officer of this corporation and a director and bound by law to know the contents of all the matters before his business. He is a lawyer—he is testifying about something that has been before him several months.

THE COURT: That is very true but I will hear the answer. Overruled.

THE WITNESS: I am certain that it was not. Otherwise

it never would have been phrased to begin with in the manner in which it is phrased.

BY MR. PRUITT:

Q If the Fort Pierce stockholders had not signed the investment letter and the legend had not been placed upon the certificates would this have been a bona fide exemption or exempt transaction?

A I doubt it very much.

Q Now, if the investment letter says that the Fort Pierce stockholders are taking the Royal American stock for investment and in truth and in fact he didn't intend to take it for investment, is that a bona fide—

MR. O'CONNELL: Just a minute. We object to that as certainly improper.

THE COURT: Well, it is a hypothetical case.

MR. O'CONNELL: Well, this investment letter—

THE COURT: I appreciate that hypotheticals are supposed to be based upon evidence before the Court.

MR. O'CONNELL: Because the evidence here—

THE COURT: I have let—at liberty let a good deal of evidence come in and—

MR. O'CONNELL: Let me make this further objection, your Honor, because investment letters say that it was

taken for investment subject to another agreement which required something be done.

THE COURT: I understand that counsel has asked just up to the word investment. I have read the letter. I know what the rest of it is. Proceed.

BY MR. PRUITT:

Q The question is if it is a false statement is it a bona fide exempt transaction?

A No, it is not.

Q They must take it for investment purposes, is that right?

MR. O'CONNELL: We object to that, your Honor.

THE COURT: The letter speaks for itself.

MR. PRUITT: I am not talking about the letter itself. I am talking about taking of this stock. If they don't take it for investment.

THE COURT: The only reason I said letter, you were quoting from it. Proceed with your answer.

THE WITNESS: In order to come within the exemption afforded by Section 41 of the Securities Act it must be a bona fide private transaction.

MR. O'CONNELL: Let me move that be stricken, your Honor, for this reason: I want it stricken because the testimony has been to the contrary. This man has testified

that if a man agreed to buy the stock back there is nothing wrong with it. The letter which is in evidence says there is nothing wrong with it because it suggests that be done. This is not—investment letter is not only for the purpose of a six-month period in which it could be purchased back.

THE COURT: Mr. O'Connell, I receive your objection and I also want all of you to know that there appears to be a goodly portion of testimony in hypothetical form which is not founded on the evidence before the Court. Such as is not will not be considered and such as is will be considered. Proceed.

MR. PRUITT: That last one wasn't a hypothetical. That was a direct question.

THE COURT: I'm sorry, Mr. Pruitt.

MR. PRUITT: I said my last question was not a hypothetical. I asked him a direct question about what constitutes the bona fide exempt transaction, that it has to be taken for investment purposes, and he said yes. That is not hypothetical. That is a statement.

THE COURT: That is all right. Proceed.

BY MR. PRUITT:

Q Now, once a stock is taken for investment purposes is it at that time necessary to register it with the Securities Exchange Commission?

A No, it is not.

Q Mr. Dillon, if this were not an exempt transaction or this stock was not taken for example for investment purposes, how could it have been transferred to the Fort Pierce stockholders, legally?

A Only pursuant to an effective registration statement or some other exemption under the Securities Act of 1933.

Q Then the stock would have had to have been registered with the SEC at that time that they took it, took the stock?

A At the time it was delivered to them, yes.

Q So, if it wasn't registered at the time with the SEC at the time they took delivery, it had to be a bona fide exempt transaction, is that correct?

A Yes.

MR. PRUITT: That is all.

THE COURT: Anything further?

MR. JONES: I want to ask you this question. You said it doesn't have to be registered. But until it is registered it can't be traded, can it? You said stock received with the legend on it under investment letter does not have to be registered.

THE WITNESS: No, it doesn't have to be registered.

MR. JONES: But if you want to trade it you must register it?

THE WITNESS: Well, stock received under investment letter is customarily not registered. The whole purpose is for the parties to avail themselves of an exemption.

MR. JONES: But I believe you said it is locked in for two years?

THE WITNESS: The SEC rule of thumb is two years.

MR. JONES: Then for two years they can't—but if they want to get rid of it within that time and if it is in fact registered then it becomes freely tradable?

THE WITNESS: That's right.

MR. JONES: All right. Therefore, while it doesn't have to be registered because nobody is going to make, no one is going out and sell their stock, in order to sell it they either are locked in for two years or it must be registered to be sold?

THE WITNESS: That is basically correct, yes.

MR. JONES: Your Honor—

THE COURT: Just a minute. Anything further?

MR. JONES: Only one thing. I would like to have a five minute conference with counsel to see if there is anything else we want to ask, but there has been some interrogatories and other things put in. I don't know just where we stand right at this moment.

THE COURT: Very well. We will be in recess for a few minutes.

(Thereupon, a short recess was taken.)

MR. JONES: We have no further questions.

THE COURT: Any further questions by anyone?

MR. PRUITT: No, sir.

THE COURT: You may step down.

(Witness excused.)

MR. JONES: We don't know how this case is going to proceed, so we would like to ask Mr. Dillon to be available if we have to use him for further—

MR. DILLON: I am not subpoenaed, Mr. Jones. I have some very pressing commitments.

MR. JONES: I hope we are going to end this thing up very shortly.

MR. PRUITT: I don't anticipate that will take very much longer.

THE COURT: Very well.

MR. PRUITT: I think it will be short examination. Might be able to get it in before the lunch hour.

MR. O'CONNELL: Did I offer these letters in evidence?

THE COURT: No. It hasn't come back—when they close you will have an opportunity. Call your next witness.

* * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing REPLY TO BRIEF OF RESPONDENTS and Appendix has been served upon each of the following:

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Attorneys for Respondents, by mail, this ..... day of ....., 1967.

.....
Attorney for Petitioners